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Supreme Court
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In The

Supreme Court of the United States

STATE OF NEW MEXICO,

Petitioner,

vs.

DEL E. ROMERO and MATTHEW GUTIERREZ,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of New Mexico

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the New Mexico Supreme Court misinterpreted and misapplied the exclusive federal definition of a dependent Indian community in 18 U.S.C. § 1151(b) and interpreted in the unanimous opinion, *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998), for purposes of determining federal criminal jurisdiction, when the New Mexico Supreme Court concluded:

A. Alleged crimes committed by an Indian on private, fee simple lands within the original exterior boundaries of a Pueblo land grant in which all Indian and United States title had been extinguished pursuant to the Pueblo Lands Act of 1924 satisfied the federal set-aside requirement of land for the use and enjoyment of an Indian community; and,

B. The federal superintendence requirement of *Venetie* was satisfied because the alleged crimes occurred on lands located within the original exterior boundaries of Pueblo land grants even though no evidence of federal superintendence over the lands was established?

II. Whether the New Mexico Supreme Court created an intolerable jurisdictional quagmire where no federal or state criminal jurisdiction may be invoked because certain lands within the original exterior boundaries of a Pueblo land grant are effectively prosecution-free zones?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of New Mexico, respectfully requests this Court issue a writ of certiorari to the New Mexico Supreme Court to review the Opinion entered on June 14, 2006.

OPINIONS BELOW

The New Mexico Supreme Court issued an Opinion in the consolidated appeal, *State of New Mexico v. Del E. Romero* and *State of New Mexico v. Matthew Gutierrez*, 142 P.3d 887 (N.M. 2006). This Opinion is reprinted at App. 1. The New Mexico Supreme Court reversed the decisions of the New Mexico Court of Appeals in *State v. Gutierrez*, No. 24,731, slip op. (N.M. Ct. App. May 20, 2004) and *State v. Romero*, 84 P.3d 670 (N.M. Ct. App. 2004). The two opinions issued by the New Mexico Court of Appeals are reprinted at App. 30 and App. 33.

JURISDICTION

The New Mexico Supreme Court issued the Opinion on June 14, 2006. The State of New Mexico filed a Motion for Rehearing on June 29, 2006. App. 91. An Order denying the State of New Mexico's motion was filed on August 30, 2006. App. 83.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a) (2006), Supreme Court Rule 10(b), and Supreme Court Rule 13. Petitioner respectfully asserts the New Mexico Supreme Court Opinion directly conflicts with a controlling federal statute – 18 U.S.C.

§ 1151(b) – and *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3:

> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Constitution of the United States, Article VI, Supremacy Clause:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

18 U.S.C. § 1151. Indian country defined.

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof and whether within or without the limits of a state, and (c) all

Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

STATEMENT OF THE CASE

State of New Mexico v. Del E. Romero

Del E. Romero, a Taos Pueblo Indian, was indicted by a Taos County, New Mexico grand jury for one count of aggravated battery. The victim was Darrell Mondragon, a Taos Pueblo Indian. The alleged crime occurred in the parking lot of Pueblo Allegre Mall, 223 Pueblo del Sur, Taos, New Mexico. Pueblo Allegre Mall is on the main thoroughfare in Taos commonly referred to as United States Highway 68. The alleged crime occurred on January 25, 2001.

Mr. Romero moved to dismiss the state criminal charge and claimed that he was an Indian; that the Pueblo Allegre Mall is located in Indian country; and that New Mexico lacked subject matter jurisdiction to prosecute a criminal charge against an Indian for an offense committed in Indian country. Judge Nelson held a short evidentiary hearing. State's Exhibit 4, a warranty deed recorded December 7, 1998, and providing the legal description of the property, was admitted.

Judge Nelson concluded the crime occurred within Indian country. App. 85-90. This conclusion was reached even though Judge Nelson found that Pueblo Allegre Mall is located on privately owned property within the original exterior boundaries of the Taos Pueblo land grant and that any Pueblo title was extinguished pursuant to the Pueblo Lands Act of 1924, 43 Stat. 636. App. 87. Judge Nelson ruled the State of New Mexico lacked subject matter

jurisdiction. The criminal charge against Mr. Romero was dismissed. App. 89-90.

The State of New Mexico appealed to the New Mexico Court of Appeals. The argument focused on the definition of Indian country in 18 U.S.C. § 1151 and specifically the definition of a dependent Indian community in 18 U.S.C. § 1151(b). The New Mexico Court of Appeals reviewed the history of Pueblos in New Mexico, the enactment of the Pueblo Lands Act of 1924 involving the federal extinguishment of title held by Indians to certain lands within the original exterior boundaries of Pueblo land grants, the codification of a dependent Indian community in 18 U.S.C. § 1151(b) in 1948, and finally, *Venetie*. App. 36-48, ¶¶ 9-28. Based on the undisputed fact that any Indian or federal title was explicitly extinguished by Section 13 of the Pueblo Lands Act of 1924 and that the alleged crime was committed on privately owned, fee simple land in the Town of Taos, the New Mexico Court of Appeals decided the State of New Mexico had jurisdiction to prosecute the alleged crime. App. 33-53.

The New Mexico Court of Appeals also cited *United States v. Pueblo of Taos*, 33 Ind. Cl. Comm. 82, *aff'd*, 515 F.2d 1404 (Ct. Cl. 1974), involving the extinguishment of title to 926 acres representing the Town of Taos. App. 40-41, ¶ 15.

Mr. Romero filed a petition for writ of certiorari in the New Mexico Supreme Court and argued that the alleged crime was committed in Indian country because "Taos Pueblo" is either a reservation, 18 U.S.C. § 1151(a), or a dependent Indian community, 18 U.S.C. § 1151(b). App. 7-8, ¶ 9. The New Mexico Supreme Court granted certiorari review and reversed the decision of the New Mexico Court of Appeals. App. 1-29.

State of New Mexico v. Matthew Gutierrez

Matthew Gutierrez, an enrolled member of the Pojoaque Pueblo, was charged by a Santa Fe County, New Mexico grand jury for aggravated battery with a deadly weapon, abuse of a child, and battery against a household member. The alleged crimes occurred on August 25, 2002. Two victims, Juan Carlos Garcia and Ben Garcia, are non-Indian relatives of Mr. Gutierrez. The child abuse charge involved Mr. Gutierrez's daughter, Brittany Gutierrez. The alleged crimes occurred on land owned in fee simple by Ben Garcia within the original exterior boundaries of the Pojoaque Pueblo land grant. The land was deeded to Jose Benito Garcia pursuant to the Pueblo Lands Act of 1924. State's Exhibit 1, the deed to the property commonly referred to as County Road J, House 14-A, in Pojoaque, County of Santa Fe, New Mexico, was admitted. Mr. Gutierrez was prosecuted in Pojoaque Tribal Court. App. 3-4, ¶ 3.

An extensive hearing on Mr. Gutierrez's motion to dismiss for lack of state court jurisdiction was held before Judge Vigil. Judge Vigil entered a Decision on February 18, 2004 which included findings of fact and conclusions of law. App. 69. Judge Vigil found that "all land within the Pueblo of Pojoaque, including private claim land, is 'Indian country.'" and "The State does not have criminal jurisdiction over Indians within the exterior boundaries of the Pueblo of Pojoaque." App. 81, ¶ 6 and ¶ 11.

The State of New Mexico appealed to the New Mexico Court of Appeals. The New Mexico Court of Appeals reversed. App. 30. In a memorandum opinion, the New Mexico Court of Appeals found that the State of New Mexico properly exercised criminal jurisdiction because the crime was not committed on land meeting the definition of

a dependent Indian community, 18 U.S.C. § 1151(b). App. 30-32.

The New Mexico Supreme Court granted certiorari review and consolidated the case with Mr. Romero's case. Mr. Gutierrez claimed "Pojaque Pueblo" was a dependent Indian community. App. 8, ¶ 9. The New Mexico Supreme Court reversed the decision of the New Mexico Court of Appeals. The State of New Mexico had no criminal jurisdiction to prosecute Mr. Gutierrez because the alleged crimes were committed in Indian country. App. 22-23, ¶ 26.

REASONS FOR GRANTING THE WRIT

I. THE NEW MEXICO SUPREME COURT IGNORED THE EXCLUSIVE DEFINITION OF A DEPENDENT INDIAN COMMUNITY IN 18 U.S.C. § 1151(B) AND CONCLUSIVELY INTERPRETED IN THE UNANIMOUS OPINION OF *ALASKA V. NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT* IN DECIDING THE ALLEGED CRIMES WERE COMMITTED IN INDIAN COUNTRY.

Congress has plenary authority over Indian affairs. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n. 7 (1973). Only the United States can extinguish original Indian title. 25 U.S.C. § 177 (2006); *United States ex rel. Hualpai Indians v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1941). "Until the title of the Indian or Indian tribes has been extinguished said lands remain under the absolute jurisdiction and control of Congress." *Toledo v. Pueblo De Jemez*, 119 F.Supp. 439, 432 (D.N.M. 1954).

Congress has conferred on the federal courts criminal jurisdiction over certain offenses committed by an Indian in Indian country. 18 U.S.C. § 1151 (2006). A state court is

bound by federal law in interpreting the definition of Indian country for the exclusive determination of federal criminal jurisdiction. U.S. Const., art. VI.

The controlling federal law for interpreting a category of Indian country known as a dependent Indian community is 18 U.S.C. § 1151(b) and *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998). The majority opinion of the New Mexico Court of Appeals duly recognized that *Venetie* was applicable to decide the issue of criminal jurisdiction. App. 37-38, ¶ 11. Applying the *Venetie* set-aside requirement, the New Mexico Court of Appeals correctly found that the land where the alleged crimes were committed was not subject to a federal set-aside for use by an Indian community. App. 47-48, ¶ 26.

Reversing the New Mexico Court of Appeals, the New Mexico Supreme Court ignored its sole responsibility to construe 18 U.S.C. § 1151(b) according to federal law. The New Mexico Supreme Court manipulated the federal standard of statutory construction for interpreting the three separate categories of Indian country in 18 U.S.C. § 1151. *United States v. LaBonte*, 520 U.S. 751, 757 (1997) (judicial assumption exists that in drafting legislation, "Congress said what it meant."). The interpretation of federal law by the New Mexico Supreme Court is simply wrong. *See New Mexico ex rel. Ortiz v. Reed*, 524 U.S. 151, 154-155 (1998) (rejecting New Mexico Supreme Court interpretation of Extradition Clause, U.S. Const. art. IV, § 2, cl. 2); *rev'g, Reed v. State ex rel. Ortiz*, 947 P.2d 86 (N.M. 1997).

A dependent Indian community refers to a "limited category of Indian lands that are neither reservations nor allotments and that satisfy two requirements." *Venetie*, 522 U.S. at 527. *See Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993) (18 U.S.C. § 1151 construed to provide three disjunctive categories of Indian

country). Following this Court's interpretation of 18 U.S.C. § 1151(b) in *Venetie*, no ambiguity exists about the meaning of a dependent Indian community. *See also State v. Frank*, 52 P.3d 404, 409 (N.M. 2002) (interpreting *Venetie* as providing "clear guidelines" and declining to incorporate a community of reference inquiry for a dependent Indian community).

The facts are undisputed in each criminal prosecution. In each case, the alleged crimes were committed on private, non-Indian, fee simple land within the original exterior boundaries of a Pueblo land grant. The fee-simple title was obtained following the extinguishment of Indian and federal title pursuant to the Pueblo Lands Act of 1924. The only dispute is legal: Whether or not the alleged crimes were committed in Indian country and, in particular, a dependent Indian community, as defined in 18 U.S.C. § 1151(b) and *Venetie*? App. 6, ¶ 17.

A. The New Mexico Supreme Court wrongly construed the historical background and legal precedents impacting New Mexico Pueblo lands.

Petitioner submits the proper analysis and legal conclusion requires a brief review of the historical background for New Mexico Pueblo lands, a review of various congressional acts, and finally, the judicial interpretation of the phrase "dependent Indian community" in *Venetie*. Since time immemorial, Pueblo Indians have lived in the Southwest and, in particular, New Mexico. This unique history of Pueblos and Pueblo Indians is presented in Nell Jessup Newton, *Cohen's Handbook of Federal Indian Law* 319-336 (2005 ed.) (hereinafter *Cohen's Handbook*).

1. *United States v. Sandoval*

The second category of Indian country in 18 U.S.C. § 1151 – a dependent Indian community – and its legal meaning for criminal jurisdiction began with the decision in *United States v. Sandoval*, 231 U.S. 28 (1913). The Santa Clara Pueblo Indian community of New Mexico exhibited an entire dependency on the federal government. *Id.* at 39-40. Based on the factual circumstances of Pueblo communities, *United States v. Sandoval*, 231 U.S. at 46, held that New Mexico Pueblo Indians were wards of the federal government generally subject to federal law governing Indians. The term "dependent Indian communities" was adopted in *United States v. Sandoval* to describe New Mexico Pueblos. *Venetie*, 522 U.S. at 530, acknowledged that "the term 'dependent Indian communities' is taken virtually verbatim from *Sandoval*."

2. New Mexico Enabling Act of 1910

The New Mexico Enabling Act, 36 Stat. 557 (1910), defined Indian country as including the lands now owned or occupied by the Pueblo Indians of New Mexico, as of June 20, 1910. N.M. Const., art. XXI, § 2, provided the status of land depended on whether or not Indian title had been extinguished: " . . . and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States." Both provisions governing the admission of New Mexico as a State, established Congress expressly linked federal dominance and governance over Indian lands to the non-extinguishment of Indian title.

3. Pueblo Lands Act of 1924

Following *United States v. Sandoval*, the titles to land held by non-Indians within the boundaries of Pueblo land grants and transferred without the prior approval of the federal government were called into question. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 243-244 (1985). The Pueblo Lands Act of 1924, 43 Stat. 636, was enacted to resolve violence and conflict relating to the ownership of lands by non-Indians within the original Pueblo land grants. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. at 243 ("relying on the rule established in [*United States v.*] *Joseph* [94 U.S. 614 (1876)], 3,000 non-Indians had acquired putative ownership of parcels of real estate located inside the boundaries of the Pueblo land grants."). *See generally Cohen's Handbook* 325-327 (Pueblo Lands Act of 1924). The title of the Pueblo Lands Act of 1924 sets forth the congressional purpose and intent: "An Act To quiet title to lands within Pueblo Indian land grants, and for other purposes."[1]

The Pueblo Lands Act of 1924 established the Pueblo Lands Board to investigate the state of title of lands within the exterior boundaries of various Pueblo land grants and to provide a procedure whereby Pueblo title to tracts of land would be extinguished in favor of non-Indian claimants under certain conditions. *Mountain States Tel.*

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[1] The Pueblo Lands Act of 1924 was amended. 119 Stat. 2573 (2005). App. 2-3, n. 1. The amendment has been interpreted to apply prospectively. *United States v. Arrieta*, 436 F.3d 1246, 1251 (10th Cir.), *cert. denied*, ___ U.S. ___, 126 S.Ct. 2368 (2006).

& Tel. Co. v. Pueblo of Santa Ana, 472 U.S. at 244-245.[2] The Secretary of the Interior was required to file "field notes and plat for each pueblo showing the lands to which Indian title had been extinguished." 43 Stat. at 640, § 13. Certified copies of the field notes were to be "accepted in any court as competent and exclusive evidence of the extinguishment of all the right, title and interest of the Indians in and to the lands so described . . . and of any claim of the United States in or to the same." *Id.* A decree in favor of a non-Indian claimant had "the effect of a deed of quitclaim as against the United States and said Indians." 43 Stat. at 637, § 5.

"Through the work of the Pueblo Lands Board, about eighty percent of non-Indian claims within the Pueblos, involving some 50,000 acres were approved."[3] *Cohen's Handbook* 327 and n. 985. The GAO Report 158, at Table 28, indicated that approximately $130 million (in constant 2001 dollars) was paid to settle land claims for Pueblo land grants in New Mexico processed by the Pueblo Lands Board (for the period 1927-1939), the Indian Claims Commission and the United States Court of Federal Claims.

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[2] The Bureau of Land Management officially maintains the surveys and plats showing the private claims made, acknowledged, and recorded pursuant to the Pueblo Lands Act of 1924. 25 U.S.C. § 176 (2006).

[3] The Pueblo Lands Act of 1924 and the extinguishment of title for various parcels of land within the original exterior boundaries of each Pueblo land grant are more fully described and documented in the United States General Accounting Office, *Treaty of Guadalupe Hidalgo, Findings and Possible Options Regarding Longstanding Community Land Grant Claims in New Mexico*, GAO 04-59 (June 2004) (hereinafter GAO Report).

In a separate action, the extinguishment of Indian title to 926 acres occupied by the Town of Taos and, originally part of the southwest corner of the original Taos Pueblo land grant, was confirmed. *United States v. Pueblo of Taos*, 33 Ind. Cl. Comm. 82, *aff'd*, 515 F.2d 1404 (1974).

4. Enactment of 18 U.S.C. § 1151

Prior to the enactment of 18 U.S.C. § 1151, "Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest[.]" *Solem v. Bartlett*, 465 U.S. 463, 468 (1984). In 1948, 18 U.S.C. § 1151 codified the three categories of Indian country for determining federal criminal jurisdiction. Congress defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments. *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. at 123. Congress explicitly uncoupled reservation status from Indian ownership in 18 U.S.C. § 1151(a). *Solem v. Bartlett*, 465 U.S. at 468.

Regarding the codification of the term "dependent Indian communities" in 18 U.S.C. § 1151(b), the following analysis made the distinction between a dependent Indian community and a reservation:

> The likelihood is that the codifiers included the second category [dependent Indian communities] precisely to include those communities, like Yahta-Hey (and like the Pueblos), that grow up without federal involvement or encouragement, and outside of established reservation boundaries, but that primarily consist of Indians living in the

> tribal relationship and subject to federal protection.

Richard W. Hughes, *Indian Law*, 18 N.M. L. Rev. 403, 461 (1988). *See generally Cohen's Handbook* 192-195 (history of 18 U.S.C. § 1151(b) and dependent Indian communities).

5. *Alaska v. Native Village of Venetie Tribal Government*

Venetie was the first occasion for this Court to interpret the term "dependent Indian communities" in 18 U.S.C. § 1151(b). *Venetie*, 522 U.S. at 527. The unanimous decision held the phrase "dependent Indian communities" had a specific meaning, distinct from the remaining two categories of Indian country (reservations and allotments) in 18 U.S.C. § 1151:

> We now hold that it refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements – first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence.

Id. This interpretation of the phrase "dependent Indian communities" was supported by the following rationale:

> The federal set-aside requirement ensures that the land in question is occupied by an "Indian community"; the federal superintendence requirement guarantees that the Indian community is sufficiently "dependent" on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question.

Venetie, 522 U.S. at 531 and nn. 6 and 7.

Specific reference to the title and the use of the land for a dependent Indian community analysis is critical. *Venetie*, 522 U.S. at 530 n. 5. *See Blatchford v. Sullivan*, 904 F.2d 542, 544 (10th Cir. 1990) (considering the land title for determining whether a crime was committed within a dependent Indian community), *cert. denied*, 498 U.S. 1035 (1991) and *United States v. Arrieta*, 436 F.3d at 1247 (focusing on the fact that title had not be quieted in favor of a non-Indian). Unlike a reservation analysis in 18 U.S.C. § 1151(a), title to the land is critical to determine whether or not the land is subject to a federal set-aside for the use of Indians as Indian land. *See State v. Dick*, 981 P.2d 796, 798 (N.M. Ct. App. 1999) (*Venetie* unequivocally shifted "the emphasis from the inhabitants and their day-to-day relationship with the government to a land-based inquiry"), *cert. quashed*, 4 P.3d 36 (N.M. 2000).

Venetie has been consistently applied in federal cases from New Mexico involving Pueblo land grants. *See United States v. Arrieta*, 436 F.3d 1246 (10th Cir.), *cert. denied*, ___ U.S. ___, 2006 WL 1221978 (2006); *United States v. M.C.*, 311 F.Supp.2d 1281 (D.N.M. 2004); and *United States v. Gutierrez*, No. CR-00-M-376 H, slip op. (D.N.M. 2000). App. 101-102. The first New Mexico federal district court interpretation and application of *Venetie* to private, non-Indian land within the original exterior boundaries of a Pueblo land grant was *United States v. Gutierrez*, an order of dismissal for lack of federal criminal jurisdiction, issued by Judge Hansen. App. 101. Judge Hansen ruled:

> As I stated on the record, the controlling case in this matter is *Alaska v. Native Village of Venetie Tribal Gov't*, which sets forth the federal set-aside and superintendence requirements for a finding of Indian Country status. 522 U.S. 520 (1998). *While the land in question may at one*

> *time have been Indian country, the Pueblo Lands Act of 1924 (43 Stat. 636) clearly and intentionally quieted title to the land in question against the Pueblo of Santa Clara. Consequently, the land in question no longer satisfies the federal set-aside requirement necessary for a finding of "Indian Country" and this Court cannot exercise subject matter jurisdiction in this case.*

App. 101-102 (emphasis added). The United States Attorney in New Mexico has uniformly followed this *Venetie* analysis in deciding whether to pursue or decline a federal prosecution of an Indian defendant, subject to the limitations of 18 U.S.C. § 1153 (2006), for crimes committed within the original exterior boundaries of a Pueblo land grant. *See* App. 63, ¶ 54 (Sutin, J. *dissenting*) (commenting on Judge Hansen's order).

B. The New Mexico Supreme Court wrongly decided that private, fee simple land within the original exterior boundaries of a Pueblo land grant satisfied the definition of a federal set-aside of land for use by an Indian community.

Without question, the lands where the alleged crimes were committed are within the original exterior boundaries of each respective Pueblo land grant and were, at one time, Indian country. The title and status of the land was changed by the Pueblo Lands Act of 1924, a Congressional act that extinguished title in Indians and the United States by the entry of a fee simple title. *See Cohen's Handbook* 328 ("Nonmembers and municipal entities also hold fee title to some lands within the original Pueblo land grants, largely because of quitclaims issued to successful claimants under the Pueblo Lands Act."). Contrary to the

holding of the New Mexico Supreme Court, the original exterior boundary of each Pueblo land grant does not necessarily signify the entire property is a Pueblo, a dependent Indian community, or a reservation. App. 11, ¶ 13. The extinguishment of Indian title and transfer of the title in fee simple to a private individual effectively negates any finding that the land is subject to a federal set-aside for the use and enjoyment of an Indian community as required by *Venetie*.[4]

The federal set-aside requirement of land for use by an Indian community was not met because private, fee simple land within the original exterior boundaries of a Pueblo land grant is not land set-aside by the federal government for the use and enjoyment of an Indian community. By definition, land in which title has been quieted in favor of a non-Indian or, stated otherwise, land to which the Pueblo Indians and United States title has been extinguished pursuant to the Pueblo Lands Act of 1924, cannot satisfy the set-aside requirement of *Venetie*. Following *Venetie*, the term "original exterior boundaries" has historical significance but no current, binding legal effect for purposes of determining whether a crime was committed in the dependent Indian community category of Indian country.

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[4] The linkage between Pueblo title and Indian country status was recognized and reaffirmed in the Santo Domingo Pueblo Claims Settlement Act, 114 Stat. 1890 (2000). As previously stated, extinguishment of Indian title for 926 acres representing the Town of Taos was acknowledged in *United States v. Pueblo of Taos*, 33 Ind. Cl. Comm. 82, *aff'd*, 515 F.2d 1404 (1974).

The parking lot of the Pueblo Allegre Mall and Mr. Garcia's private residence are not subject to the federal set-aside requirement mandated by 18 U.S.C. § 1151(b). It is an undisputed fact that titles to Pueblo Allegre Mall and Mr. Garcia's land are not held by the United States in trust for the benefit of any Pueblo or by any Pueblo. This uncontroverted fact is further supported by *United States v. Taos*, 515 F.3d 1404 (Ct. Cl. 1975); *United States v. Wooten*, 40 F.2d 882 (10th Cir. 1930), and the GAO Report. Simply stated, the federal set-aside of land for use by an Indian community has not been met. *See Venetie*, 522 U.S. at 533 (federal set-aside requirement was not met; Congress contemplated that non-Indians would own the former Venetie Reservation land and that the Tribe was free to use the land for non-Indian purposes); *United States v. M.C.*, 311 F.Supp.2d at 1295 (land was not set-aside for use by an Indian community); and *Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.*, 89 F.3d 908, 920-921 (1st Cir. 1996) (where land was privately held, even if by a tribe, courts have found that there was no dependent Indian community).

It is illogical for Indian and federal title to be extinguished, yet at the same time, find that the land has been the subject of a federal set-aside for use by an Indian community. App. 19-22, ¶¶ 23-25. Land that is held in fee simple by a non-Indian is not subject to the unique relationship between the federal government and an Indian community. *See also* GAO Report 156 ("In contrast to land grants to non-Indians, the U.S. government currently has a fiduciary duty, or "trust responsibility," to protect Indian lands that the U.S. government holds in trust for the Pueblos in New Mexico).

1. The New Mexico Supreme Court blurred the important distinctions between a reservation and a dependent Indian community.

The New Mexico Supreme Court essentially redefined a dependent Indian community as that term is used in 18 U.S.C. § 1151(b) and *Venetie* by blurring the legal, historical, and judicial distinctions between a reservation and a dependent Indian community. Without due deference to the proposition that only federal law controls the definition of Indian country, the New Mexico Supreme Court not only declined to fully adopt the *Venetie* analysis but also decided to employ a tortured analysis using both reservation and dependent Indian community factors to reach the conclusion that the alleged crimes occurred in Indian country.

The New Mexico Supreme Court failed to recognize the three distinct categories of Indian country and, instead, eroded the definitions of a reservation and a dependent Indian community. The New Mexico Court of Appeals in *State v. Romero*, App. 36-38, ¶¶ 9-11 and App. 43-45, ¶¶ 18-22, correctly made the historical, political, and legal distinctions between a reservation and a dependent Indian community. Historically, Indian reservations generally represent a federal policy mandating the forced relocation of Indians from aboriginal lands and a reservation of federal public domain land for a specific Indian tribe. *Cohen's Handbook* 64-65. Unlike reservations, New Mexico Pueblos retained aboriginal lands. *Cohen's Handbook* 319-336. The history of New Mexico Pueblos shows that Pueblo land grants are not reservations within the meaning of federal Indian law. Congress did not reserve the Pueblo lands out of lands ceded by the Pueblo Indians to the United States or out of public

lands owned by the United States. *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1388 (Ct. Cl. 1975). This inconsistent interpretation of private, fee simple lands within the original exterior boundaries of a Pueblo land grant by New Mexico appellate courts is noted in *Cohen's Handbook* 335-336, n. 1062 and n. 1063.[5]

Instead of concentrating exclusively on 18 U.S.C. § 1151(b), the New Mexico Supreme Court decided to use the broad term and meaning of Indian country and confused the definitions of a dependent Indian community and an Indian reservation, 18 U.S.C. § 1151(a). This manipulation of 18 U.S.C. § 1151 justified the erroneous conclusion that the State of New Mexico had no criminal jurisdiction to prosecute an Indian for alleged crimes committed on private, fee-simple land within the original exterior boundaries of a Pueblo land grant. The New Mexico Supreme Court relied on New Mexico state cases issued prior to *Venetie* in holding, "Indian reservations and dependent Indian communities are not two distinct definitions of place, but definitions which largely overlap." *Blatchford v. Gonzales*, 670 P.2d 944, 946 (N.M. 1983), *cert. denied*, 464 U.S. 1033 (1984). *See State v. Ortiz*, 731 P.2d 1352, 1355-1356 (N.M. Ct. App. 1986) (no distinction between 18 U.S.C. § 1151(a) and 18 U.S.C. § 1151(b); finding that crime committed on private fee land or a public thoroughfare in a non-Indian town (Espanola, New Mexico) was Indian country). App. 17-18, ¶ 20 and ¶ 22.

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[5] "If they are treated as 'reservations,' fee patent lands are still Indian country within the meaning of the Indian country statute. However, if they are 'dependent Indian communities,' the fee lands may not be considered part of the communities."

Contrary to the New Mexico Supreme Court's imprecise interpretation of 18 U.S.C. § 1151, only a dependent Indian community analysis applies and not a reservation analysis, 18 U.S.C. § 1151(a). Pueblos and land within the original exterior boundaries of a Pueblo land grant are not, and have never been, reservations. Equating the history and policy of Indian reservation lands with the aboriginal context of Pueblos is erroneous and contorts the three distinct categories of Indian country set forth in 18 U.S.C. § 1151. *Venetie*, 522 U.S. at 527.

2. The Pueblo Lands Act of 1924 explicitly extinguished all Indian and federal title, right and interest to certain parcels of land within the original exterior boundaries of the Pueblo land grants.

The New Mexico Supreme Court relied on "congressional silence" to find that the alleged crimes were committed in Indian country and not subject to State criminal jurisdiction:

> Thus, given the overlapping nature of the terms reservation and pueblo and the overlapping nature of §§ 1151(a) and (b), we think it is fair to conclude, in the face of *congressional silence* that the fee land within a § 1151(b) dependent Indian community is Indian country just like the fee land within a § 1151(a) reservation.

App. 18, ¶ 22 (emphasis added) and App. 7, ¶ 8 ("We note, however, that any ambiguity in § 1151 or the Pueblo Lands Act . . . is to be resolved in favor of the Defendant Indians."). The New Mexico Supreme Court rejected the State of New Mexico's argument: "Due to the lack of substantial and compelling evidence of congressional intent to change

Indian country status, we must reject the State's overly-broad interpretation that the Pueblo Lands Act extinguishes Indian country status merely by allowing non-Indians to have fee title to certain parcels." App. 22, ¶ 25.

The apparent motivation for an analysis of a dependent Indian community based on "congressional silence" developed from legal precedent discussing the reservation category of Indian country. In this endeavor, the New Mexico Supreme Court cited *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962); *Hilderbrand v. Taylor*, 327 F.2d 205 (10th Cir. 1964); and *DeCoteau v. Dist. County Ct.*, 420 U.S. 425 (1975). App. 11, ¶ 13; App. 12-13, ¶ 16; App. 19, ¶ 23; and App. 20, ¶ 24. In addition, the New Mexico Supreme Court concluded: "We decide that Congress has not shown clear intent to extinguish Indian country status, so Indian country status for the privately-held parcels within the Taos and Pojoaque Pueblos' exterior boundaries has not been extinguished." App. 19-20, ¶ 23. "In sum, location within the exterior boundaries matters more than who holds title." App. 21, ¶ 24.

The New Mexico Court of Appeals correctly interpreted congressional intent and how the congressional action changed the jurisdictional status of certain lands within the original exterior boundaries of a Pueblo land grant:

> We conclude that in enacting the PLA, Congress clearly understood that it was altering the jurisdictional status of those lands as to which title was quieted in favor of a non-Indian, and that unless Congress subsequently acted to restore the Indian country status of these lands they remain outside Indian country.

App. 43, ¶ 17.

The State of New Mexico submits that Congress has overwhelmingly demonstrated that private, fee-simple lands within the original exterior boundaries of Pueblo land grants are not Indian country and, specifically, not dependent Indian communities. The entire chronology of congressional actions impacting New Mexico Pueblo lands and the mandatory requirements for dependent Indian community status establishes the jurisdictional status of certain lands within the original exterior boundaries of the Pueblo land grants was effectively changed.

3. The New Mexico Supreme Court discounted *Venetie* because *Venetie* addressed Alaska Native lands.

The New Mexico Supreme Court decided that *Venetie* did not necessarily apply to New Mexico's dependent Indian communities because *Venetie* addressed Alaska Native lands, a system "which has no bearing on the land ownership system for New Mexico pueblos." App. 9, ¶ 11; App. 10, ¶ 12 ("This may be perfectly apt when construing the Alaska Native Claims Settlement Act as in *Venetie*, but the Court likely was not considering the unique circumstances of New Mexico's pueblos."); and App. 24, ¶ 29 (Chavez, J., *specially concurring*) ("I write separately because I respectfully believe" *Venetie* "goes beyond what is necessary for resolution of this case," and "The *Venetie* analysis and its two prong test is not necessary when a crime is committed within the exterior boundaries of a New Mexico pueblo, since pueblos have already been recognized as Indian country.").

The New Mexico Supreme Court ignored the fundamental rules regarding federal statutory construction as well as the Supremacy Clause, U.S. Const., art. VI, in

discounting the applicability of *Venetie* to New Mexico Pueblo lands. The controlling federal law is 18 U.S.C. § 1151(b) and *Venetie*. Unlike the New Mexico Supreme Court declarations, *Venetie* must equally govern and resolve the question of criminal jurisdiction in any dependent Indian community within the United States.

4. The New Mexico Supreme Court refused to acknowledge specific legal terms used in federal Indian law.

In order to reach the wrong legal conclusion that the alleged crimes were committed in Indian country, the New Mexico Supreme Court misapprehended that the terms and definitions of "original exterior boundaries", "diminishment", and "extinguishment" are consistently used in federal Indian law statutes, cases, treatises, and texts.[6] Each term has a specific definition for interpreting the three different categories of Indian country in 18 U.S.C. § 1151. The term "extinguishment' has been consistently used to describe Indian title in federal statutes and federal cases. *Bates v. Clark*, 95 U.S. 204, 208 (1877) and 43 U.S.C. § 1603(c) (2006) (express language of extinguishment of aboriginal claim). In particular, the Pueblo Lands Act of 1924 and the Santo Domingo Pueblo Claims Settlement Act, 25 U.S.C. § 1177d(b) (2006), provide direct evidence of an expressed congressional intent concerning

[6] *See* App. 19, ¶ 23 and n. 3 (noting the State relied on the word "extinguish" because that is the word used in the Pueblo Lands Act; rejecting distinction between "extinguish" and "diminish" because for purposes of "resolving whether the land in question is currently Indian country in general and beyond the State's criminal jurisdiction, the extinguish versus diminish debate is "not significant") and App. 25-26, ¶ 31 and n. 4 (discussing creation of Indian reservations).

Pueblo lands in New Mexico and the impact of extinguishment of Indian title to lands within the original exterior boundaries of a Pueblo land grant.[7]

5. The New Mexico Supreme Court wrongly considered other, irrelevant federal statutes involving federal Indian lands.

The New Mexico Supreme Court refused to acknowledge the only applicable federal statute for the determination of federal criminal jurisdiction is 18 U.S.C. § 1151(b). The New Mexico Supreme Court relied on other and irrelevant federal statutes impacting various areas of Indian law. App. 15-17, ¶ 19. Definitions impacting Indians and Indian lands contained in other federal statutes, exclusive of 18 U.S.C. § 1151(b), are not controlling for purposes of determining federal criminal jurisdiction. *Arizona Pub. Serv. Co. v. Envtl. Protection Agency*, 211 F.3d 1280, 1293 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 970 (2001).

C. The New Mexico Supreme Court wrongly decided that the alleged crimes were committed on land that was subject to pervasive federal superintendence.

The second requirement of *Venetie* for the determination of a dependent Indian community, and thereby invoking federal criminal jurisdiction, is federal superintendence. The definition of federal superintendence was presented in *Venetie*, 520 U.S. at 534:

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[7] 25 U.S.C. § 1777d(b) (2006) states the limitation: "Any lands or interests in lands within the Santo Domingo Pueblo Grant, that are not owned or acquired by the Pueblo, shall not be treated as Indian country within the meaning of section 1151 of Title 18."

> Our Indian country precedents, however, do not suggest that the mere providing of "desperately needed" social programs can support a finding of Indian country. Such health, education, and welfare benefits are merely forms of general federal aid; considered either alone or in tandem with ANSCA's minimal land-related protections, *they are not indicia of active federal control over the Tribe's land sufficient to support a finding of federal superintendence.*

(Emphasis added). "Superintendence over the land requires the active involvement of the federal government." *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir.), *cert. denied*, 510 U.S. 994 (1993). *See also Weddell v. Meierhenry*, 636 F.2d 211, 213 (8th Cir. 1980) ("it would be unwise to expand the definition of a dependent Indian community to include a locale merely because a small segment of the population consists of Indians receiving various forms of federal assistance"), *cert. denied*, 451 U.S. 941 (1981). Federal superintendence is shown only "where the degree of Congressional and executive control over the tribe is so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area." *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.*, 89 F.3d at 920. "It is the land in question, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal government." *Venetie*, 522 U.S. at 531 n. 5.

The New Mexico Supreme Court addressed the question of federal superintendence by reference to the wrong land: "Instead, we look to the pueblo as a whole and determine if the pueblo is under federal governmental superintendence. Considering the pueblo as a whole is also

consistent with congressional intent in enacting § 1151 because it discourages checkerboarding." App. 12-13, ¶ 16.

The Pueblo Allegre Mall and Mr. Garcia's private residence fail to satisfy this legal requirement of federal superintendence over land for the benefit of an Indian community. Federal superintendence was not established because the primary purpose of the Pueblo Allegre Mall is a privately owned, commercial enterprise. The federal government does not actively control the land acting either as a guardian or trustee for an Indian community. Unlike the Pueblo of Taos where federal superintendence is undisputed, the Town of Taos and the State of New Mexico – not the federal government – renders basic services to the general public, not an Indian community.

Federal superintendence was not established on the land where Mr. Gutierrez committed the alleged crimes. No Indian or Indian community received any of the pervasive federal oversight and benefits required to establish federal superintendence. The most compelling evidence about the lack of federal superintendence was presented during the state evidentiary hearing in *State v. Gutierrez*. Kevin Gover, a member of the Pawnee Tribe of Oklahoma, testified on behalf of Mr. Gutierrez. Mr. Gover, an attorney, was appointed to the post of Assistant Secretary for the Interior, Indian Affairs in October 1997. Mr. Gover was admitted as an expert witness in the area of federal Indian law and on the policy and administration of Indian affairs. Mr. Gover testified:

> Q: Mr. Gover, does the Federal government today superintend all land within the exterior boundaries of the Pueblo [of Pojoaque]?

> A: It does not superintend the land itself in the case of land owned by non-Indians. [The] United States has no authority, frankly, to control the disposition of land, for example by a non-Indian within the reservation.

The New Mexico Supreme Court failed to properly evaluate and apply the *Venetie* federal superintendence standard. App. 13-14, ¶ 17. No federal superintendence was exercised over the two separate land parcels where the alleged crimes occurred.

II. THE CONFLICTING NEW MEXICO STATE AND FEDERAL OPINIONS INTERPRETING A DEPENDENT INDIAN COMMUNITY HAVE RESULTED IN "PROSECUTION FREE" ZONES ON CERTAIN PARCELS OF LAND IN NEW MEXICO.

This Court should grant this petition because the conflicting New Mexico state and federal decisions interpreting a dependent Indian community have resulted in "prosecution-free" zones on certain lands within the original exterior boundaries of the Pueblo land grants. Both the New Mexico Supreme Court and the New Mexico Court of Appeals offered invitations to this Court to decide the important question of criminal jurisdiction for private, fee-simple land owned within the original exterior boundaries of the Pueblo land grants. App. 10, ¶ 12 and n. 2 and App. 63-64, ¶ 54 (Sutin, J., *dissenting*). The jurisdictional confusion is also reflected in *Cohen's Handbook*: "One unresolved question is whether non-Indian owned fee land within the outer boundaries of Pueblo grant lands constitute Indian country for purposes of federal law delineating the scope of federal, tribal, and state jurisdiction." *Cohen's Handbook* 335 and n. 1061.

The State of New Mexico respectfully submits that the current law in New Mexico presents two conflicting judicial perspectives. Since *Venetie*, the United States District Court for the District for New Mexico and the Tenth Circuit Court of Appeals have consistently decided that private, fee-simple land within the original exterior boundaries of a Pueblo land grant is not a dependent Indian community. Federal criminal jurisdiction is not invoked. Contrary to the federal decisions, the New Mexico Supreme Court has concluded the State had no criminal jurisdiction to prosecute the alleged crimes on the same property. The practical impact of the mutually exclusive federal and state court decisions is that "prosecution-free" zones currently exist on certain parcels of land in New Mexico: An Indian defendant is not prosecuted in either federal or state court if the alleged crime was committed on private, fee simple land within the original exterior boundaries of a Pueblo land grant.

Jurisdictional tests should be clear, easy to apply and capable of producing predictable results. The two-prong analysis of *Venetie* provides a clear, easy to apply and predictable outcome for the determination of federal criminal jurisdiction in New Mexico. The New Mexico Supreme Court created unnecessary havoc and chaos by rejecting the *Venetie* analysis and, instead, resorting to a general definition of Indian country and confusing both reservation and dependent Indian community definitions. As of today's date, Mr. Romero and Mr. Gutierrez have never been prosecuted in either federal or state court for the alleged crimes. Four victims have been denied justice.

A damning and haunting portrayal addresses the urgency and need for the ultimate resolution of the criminal jurisdictional issue by this Court: "Unfortunately,

the intricate web of laws governing criminal jurisdiction in Indian country can hinder law enforcement efforts." *Cohen's Handbook* 730 and nn. 1 and 2 (statistics reveal that American Indians are victims of violent crime at least twice as often as other racial groups; approximately seventy percent of these crimes are interracial). This Court should grant the writ and address this important criminal jurisdictional issue. *See Williams v. Lee*, 358 U.S. 217, 218 (1959) (certiorari review appropriate because lower court opinion "was a doubtful determination of the important question of state power over Indian affairs").

CONCLUSION

The State of New Mexico respectfully asks this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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Supreme Court of New Mexico.
STATE of New Mexico, Plaintiff-Respondent,
v.
Del E. **ROMERO**, Defendant-Petitioner.
Nos. 28,410, 28,688.

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Rehearing Denied Aug. 30, 2006.
As Revised Sept. 12, 2006.

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OPINION

SERNA, Justice.

{1} The State of New Mexico charged Defendant Romero for alleged crimes on privately-owned land within the exterior boundaries of Taos Pueblo and Defendant Gutierrez for alleged crimes on privately-owned fee land within the exterior boundaries of Pojoaque Pueblo. Both Defendants challenged the indictments due to the State's lack of jurisdiction to prosecute Indians in Indian country and petitioned this Court to determine whether the State has jurisdiction.[1] We conclude that the State does not have

[1] Congress amended the Pueblo Lands Act, S. 2932, 68th Cong., 43 Stat. 636 (1924), after the briefing, oral argument, and submission of the pending cases to this Court. *See* S. 279, 109th Cong., 119 Stat. 2573

(Continued on following page)

jurisdiction to prosecute Defendants for alleged crimes occurring within the exterior boundaries of the pueblos; therefore, we affirm the district courts and reverse the Court of Appeals.

I. FACTS AND PROCEDURAL POSTURE

{2} Defendant Del E. Romero is an enrolled member of Taos Pueblo. On June 19, 2001, a State of New Mexico Grand Jury indicted Defendant Romero for alleged aggravated battery against another enrolled member of Taos Pueblo. Defendant Romero moved to dismiss the indictment on August 13, 2001, due to the State's lack of jurisdiction because the State indicted him for alleged acts within the exterior boundaries of Taos Pueblo. The State contested this assertion and argued that the alleged acts occurred at privately-owned Pueblo Alegre Mall within the boundaries of Taos Town, and outside the exterior boundaries of Taos Pueblo. The parties eventually agreed that the incident occurred on private property within Taos Town and within the exterior boundaries of the Taos Pueblo Land Grant. The district court concluded that the State did not have jurisdiction and dismissed the indictment on December 7, 2001. The State appealed.

{3} Defendant Matthew A. Gutierrez is an enrolled member of Pojoaque Pueblo. On August 25, 2002, Pojoaque Pueblo Tribal Police arrested Defendant Gutierrez after a stabbing incident. Defendant Gutierrez was arraigned in

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(2005). President George W. Bush signed the amendment, Senate Bill 279, on December 20, 2005. Although this amendment helps clarify congressional intent regarding jurisdiction, it was enacted after the alleged crimes occurred and therefore does not control disposition of these appeals.

Pojoaque Tribal Court on August 29, 2002, for assault, battery, carrying a concealed weapon, criminal negligence, and disorderly conduct in violation of Pojoaque Pueblo Tribal Law and Order Code. He did not contest the tribal court's jurisdiction. The Pojoaque Pueblo Tribal Police Department contacted the Bureau of Indian Affairs, which commenced an investigation and referred the matter to the United States Attorney for the District of New Mexico for prosecution. After the commencement of the tribal prosecution, the State of New Mexico indicted Defendant Gutierrez on September 13, 2002, for the same incident. The State charged aggravated battery with a deadly weapon, child abuse, and battery against a household member. The alleged victims are non-Indians. Pojoaque Pueblo Chief Judge Edie Quintana entered a Memorandum Opinion and Declaratory Judgment on October 7, 2002, declaring that the tribal court had jurisdiction. Defendant moved to dismiss the State indictment on January 27, 2003, due to the State's lack of jurisdiction. The State and Defendant Gutierrez disputed whether the alleged crimes occurred in Indian country. The parties agree that the alleged crime occurred within the exterior boundaries of the Pojoaque Pueblo on non-Indian fee land owned by Defendant Gutierrez's father-in-law, Ben Garcia. The district court dismissed the case due to the State's lack of jurisdiction. The State appealed. The Court of Appeals reversed the district courts in both cases in split decisions. *State v. Romero,* 2004-NMCA-012, 135 N.M. 53, 84 P.3d 670; *State v. Gutierrez,* No. 24,731 (Ct.App. May 20, 2004).

{4} In addition to the contemporary facts specific to the pending cases, historical facts are also relevant to resolving the jurisdictional dispute. Taos Pueblo was

settled in approximately 1000 A.D. Rubén Sálaz Márquez, *New Mexico: A Brief Multi-History* 4 (1999). Our government has previously recognized that Pojoaque Pueblo has been inhabited since approximately 850-1100 A.D. *See* Department of the Interior, National Park Service, Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects from New Mexico in the Possession of the Museum of Indian Arts and Culture/Laboratory of Anthropology, Museum of New Mexico, Santa Fe, N.M., 63 Fed.Reg. 35,608 (June 30, 1998). In 1540, the pueblo people encountered their first European, Francisco Vásquez de Coronado. Sálaz Márquez, *supra,* at 14. In 1598, Juan de Oñate claimed for Spain land that is now New Mexico and met with the pueblo people to explain his colonizing efforts. *Id.* at 19, 23. Between 1684 and 1691, Governor Jironza Cruzate made land grants on behalf of Spain of approximately 17,000 acres to each pueblo, *id.* at 69-70, which started the chain of title that is recognized by this state's modern-day property law system. In 1821, the land over which this Court is now supreme changed hands from Spain to Mexico. *Id.* at 170. In 1850, New Mexico became a United States territory. *Id.* at 243. Congress then confirmed Taos and Pojoaque Pueblos' land grants. Act of December 22, 1858, 35th Cong., 11 Stat. 374 (1859). Prior to statehood, the United States Congress passed New Mexico's Enabling Act, which confirmed the grants made to the Territory of New Mexico. H. Res. 18166, 61st Cong., 36 Stat. 557 (1910). In 1912, New Mexico became a state. Sálaz Márquez, *supra,* at 424. Then, in 1924, the Pueblo Lands Act recognized this history. In 1948, Congress passed an Indian country criminal jurisdiction statute, 18 U.S.C. § 1151 (1948). In 1998, the United States Supreme Court decided *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 118

S.Ct. 948, 140 L.Ed.2d 30 (1998) and came down with the set aside and superintendence standard.

{5} Consistent with this history, the district judge in Defendant Romero's case regarding Taos Pueblo decided that the land in question was clearly within the exterior boundaries of the pueblo grant. In Defendant Gutierrez's case within Pojoaque Pueblo, the district judge found as a fact that, "[t]he site of the alleged crime has been 'Indian country' for hundreds of years and has been acknowledged as such by the federal government."

II. STANDARD OF REVIEW

{6} Statutory construction is a question of law that is reviewed de novo. *State v. Rowell,* 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995). This Court defers to a district court's fact determinations if such findings are supported by substantial evidence. *State v. Frank,* 2002-NMSC-026, ¶ 10, 132 N.M. 544, 52 P.3d 404. In this case, we defer to the district courts' findings of facts because they are supported by substantial evidence.

III. ANALYSIS

A. Indian Country

{7} We are called upon to determine whether the State has jurisdiction to prosecute alleged crimes committed by Defendant Indians on private fee land within the exterior boundaries of Defendants' respective pueblos. If the land in question is Indian country, the State prosecution must be dismissed. Resolving this requires an interpretation of federal law because Congress has codified in 18 U.S.C. § 1151 what lands are "Indian country" for

purposes of criminal prosecution. Even though our state judiciary has confronted this issue before, we base our decision in these cases on federal law because the laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . . ." U.S. Const. art. VI, cl. 2. The criminal jurisdiction statute, 18 U.S.C. § 1151, states:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

{8} The federal statutes we apply demand the outcome that jurisdiction not rest with the State. We note, however, that any ambiguity in § 1151 or the Pueblo Lands Act, S. 2932, 68th Cong., 43 Stat. 636 (1924), is to be resolved in favor of the Defendant Indians. The canons of construction favor the Indians: "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985).

{9} Defendant Romero argues that Taos Pueblo is Indian country within § 1151 for two reasons: "(a) all land

within the limits of any Indian reservation" applies because a pueblo is a reservation, and "(b) all dependent Indian communities" applies because pueblos are dependent Indian communities. The State counters that Taos Pueblo is neither a reservation nor a dependent Indian community. It is not in dispute for this Defendant that subsection (c) does not apply. Defendant Gutierrez argues that Pojoaque Pueblo is Indian country for one reason: "(b) all dependent Indian communities" applies because pueblos are dependent Indian communities. The State again counters that Pojoaque Pueblo is not a dependent Indian community. Subsections (a) and (c) are not in dispute for this Defendant.

{10} We determine that a pueblo is a dependent Indian community within the meaning of § 1151(b). Nearly one hundred years ago, long before Congress codified the term dependent Indian community in § 1151, the United States Supreme Court decided *United States v. Sandoval,* 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913), which addressed whether the Pueblo Indians are the same as other Indians for the purpose of prohibiting liquor sales. The case established that pueblos are regarded as dependent Indian communities:

> As before indicated, by an uniform course of action beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes . . . this assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling.

Id. at 47, 34 S.Ct. 1. The 1913 opinion which, in part, gave rise to § 1151(b), does aid our statutory construction because it treats a pueblo as a dependent Indian community. 18 U.S.C. § 1151, Historical and Statutory Notes (basing definition on latest construction of the term by United States Supreme Court).

{11} The United States Supreme Court also more recently delineated the term dependent Indian community for the purpose of construing § 1151(b) in *Venetie,* 522 U.S. 520, 118 S.Ct. 948, 140 L.Ed.2d 30. We adopted the *Venetie* analysis in *Frank.* In *Venetie,* the Court determined whether the land in question was Indian country for the purposes of adjudicating a tax liability dispute. To determine if the land was Indian country, the Court construed the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (1971), which has no bearing on the land ownership system for New Mexico pueblos. *See Frank,* 2002-NMSC-026, ¶¶ 28-29, 132 N.M. 544, 52 P.3d 404 (Minzner, J., dissenting). With the specific Alaskan facts in mind, the Court employed a two-prong test to determine the existence of a dependent Indian community.

> We now hold that [dependent Indian community] refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements – first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence. Our holding is based on our conclusion that in enacting § 1151, Congress codified these two requirements, which previously we had held necessary for a finding of "Indian country" generally.

Venetie, 522 U.S. at 527, 118 S.Ct. 948.

{12} As a preliminary issue, we reckon with the phrase "a limited category of Indian lands that are neither reservations nor allotments." Prior to *Venetie,* it was commonly understood that the three categories of § 1151 were overlapping. "It is apparent that Indian reservations and dependent Indian communities are not two distinct definitions of place but rather definitions which largely overlap." Felix S. Cohen, *Handbook of Federal Indian Law* 38 (1982 ed.). However, Justice Thomas seemed to indicate that a particular piece of Indian country could not be both a reservation as described in § 1151(a) and a dependent Indian community as described in § 1151(b). This may be perfectly apt when construing the Alaska Native Claims Settlement Act as in *Venetie,* but the Court likely was not considering the unique circumstances of New Mexico's pueblos. For the purposes of resolving the cases before us in which Defendant Romero from Taos Pueblo argues that both §§ 1151(a) and (b) apply and Defendant Gutierrez from Pojoaque Pueblo argues only that § 1151(b) applies, we base our decision that pueblos are Indian country on dependent Indian community status within the meaning of § 1151(b) as determined by Justice Thomas' two-prong test in *Venetie.*[2] In applying *Venetie's* analytical framework to New Mexico's pueblos, we produce a jurisdictional result that restates what we understood the law to be even prior to *Venetie.*

[2] We note that if the United States Supreme Court disagreed with this Court, and instead held that a pueblo is *either* a reservation *or* a dependent Indian community, the outcome of these cases would still be the same: the lands in question are Indian country and the State does not have jurisdiction.

{13} We hold that the lands in question satisfy *Venetie's* first prong regarding the federal set aside requirement. Defendants and the State do not agree on which land is to be considered under *Venetie's* two prongs. The State asks us to consider the specific parcels of private fee land within the exterior boundaries of Taos and Pojoaque Pueblos that are the locations of the alleged crimes and argues that the parcels of private fee land have not met the requirements of federal set aside, so the land in question is not Indian country within § 1151(b). Defendants urge us to review all land within the pueblos' exterior boundaries considered as a whole and assert that these lands have met *Venetie's* federal set aside standard, so the land in question is Indian country within § 1151(b). In order for this Court to determine if the land in question meets the federal set aside prong, we are guided by the fact that even the now privately-held parcels have been previously recognized as set aside by the federal government for the use of the Indians as Indian land, as discussed in the facts section. Both the United States Supreme Court and our state courts have previously resolved this issue in favor of Indian defendants. *Seymour v. Superintendent of Washington State Penitentiary,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962); *State v. Ortiz,* 105 N.M. 308, 731 P.2d 1352 (Ct.App.1986).

{14} A brief note on potentially conflicting precedent is merited. The State cites *Frank,* 2002-NMSC-026, 132 N.M. 544, 52 P.3d 404, for the proposition that we have previously adopted *Venetie's* two-prong analysis. The State's answer briefs do not raise the following issue from *Frank,* but we do in order to dispose of it: "In light of the clear guidelines in the *Venetie* opinion, we decline to incorporate a community of reference inquiry into our case

law." *Id.* ¶ 22. This case is distinguishable from *Frank,* which involved highway land owned by the federal government, and thus presented a different jurisdictional dispute regarding an initial determination of whether the land in question was Indian country. The initial determination of whether the land in question is Indian country is easier in the present cases because, independent of the community of reference analysis, statutes and cases provide guidance. Congress and the United States Supreme Court have established that pueblo lands are Indian country. *See* the Enabling Act, H. Res. 18166, 61st Cong., 36 Stat. 558 (1910) ("the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico . . . "), and *Venetie's* statement, based on *Sandoval,* that pueblos may be Indian country, 522 U.S. at 528, 530, 118 S.Ct. 948. Since we also conclude that pueblos satisfy the federal set aside and federal superintendence tests for Indian country set out in *Venetie,* pueblos qualify as Indian country.

{15} In sum, we hold that *Venetie's* set aside requirement is satisfied by congressional acts recognizing pueblo land, and in this case also by the district judges' fact findings, even though new law, such as § 1151 enacted in 1948, is rarely a perfect fit for a land ownership system that started hundreds of years ago by prior sovereign nations. To hold otherwise would suggest ignorance of established historical record regarding governmental protection from the time of the Spanish conquistadores through the Pueblo Lands Act of 1924.

{16} We also hold that the lands in question are under federal superintendence as required by *Venetie's* second prong. The *Venetie* Court wrote, "the federal superintendence

requirement guarantees that the Indian community is sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question." 522 U.S. at 531, 118 S.Ct. 948. The State relies on the statement, "[I]t is the land in question, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government." *Id.* at 531 n. 5, 118 S.Ct. 948 (emphasis omitted). The State argues that we should look only to the parcels of private fee land, rather than the whole pueblo, but the State does not cite any authority for this narrow interpretation. We do not think it makes sense to apply the test only to the parcels of private fee land when the sites of the alleged crimes are encompassed by the exterior boundaries of the pueblos. Instead, we look to the pueblo as a whole and determine if the pueblo is under federal government superintendence. Considering the pueblo as a whole is also consistent with congressional intent in enacting § 1151 because it discourages checkerboarding. *Hilderbrand v. Taylor,* 327 F.2d 205, 207 (10th Cir. 1964) ("Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid." (quoting *Seymour,* 368 U.S. at 358, 82 S.Ct. 424)); *Cohen, supra,* at 39 (noting that "full statute was intended to reduce earlier difficulties which had arisen from the 'checkerboarding' of land ownership and rights-of-way").

{17} Defendant Gutierrez established an evidentiary trial record that Pojoaque Pueblo is under federal superintendence, which led the trial judge to find, "[t]he federal

government has had the responsibility for the superintendence of all lands within the Pueblo of Pojoaque since the United States confirmed Spanish and Mexican grants in 1864." Further, "[f]or 150 years, the United States, primarily through the Bureau of Indian Affairs, has governed all aspects of tribal life." The trial court continued, "[t]he federal government today superintends any conduct by an Indian on all land within the reservation, including non-Indian or private claim land." The court further found, "[t]he federal government has historically superintended all land, whether pueblo-owned or private claim, that is located within the exterior boundaries of the Pueblo of Pojoaque." We accept the trial judge's fact findings because they are based on substantial evidence, and we therefore conclude that Defendant Gutierrez and Pojoaque Pueblo satisfy *Venetie's* federal superintendence prong. Even though Defendant Romero argued § 1151(a) and § 1151(b) on appeal, he did not argue § 1151(b) at the trial court level, so he did not develop federal superintendence evidence for Taos Pueblo. While we could remand the Romero case for an evidentiary hearing regarding § 1151(b) and *Venetie's* federal superintendence prong, we return to the overriding considerations: Defendant Romero satisfied *Venetie's* federal set aside prong for Taos Pueblo, the parties agree that the incident occurred within Taos Pueblo's exterior boundaries, in considering federal superintendence we look at the pueblo as a whole, and we have no reason to question that Taos Pueblo is different than Pojoaque Pueblo in regard to federal superintendence. Both state and federal courts have recognized federal superintendence over pueblo lands. This question has been resolved so consistently that it is unnecessary for a district court to repeat the exercise. In light of history, we hold that pueblos are subject to federal superintendence, and a

district court may so presume. Further fact finding is only necessary in the event that the State makes a persuasive showing that circumstances regarding federal superintendence have changed in a significant way.

{18} This Court's conclusion regarding § 1151(b) is also supported by the seminal treatise in this field, *Felix S. Cohen's Handbook of Federal Indian Law* at 39.

Unlike section 1151(a), 18 U.S.C. § 1151(b) does not expressly include patented lands and rights-of-way within its terms. But the terms of section 1151(b) refer to residential Indian communities under federal protection, not to types of land ownership or reservation boundaries. Also, the full statute was intended to reduce earlier difficulties which had arisen from the "checkerboarding" of land ownership and rights-of-way. Thus, patented parcels of land and rights-of-way within dependent Indian communities should also be within Indian country. It must be inferred, however, that the statute intended to include only Indian communities with reasonably defined boundaries, and land ownership boundaries will often be the major factor in determining a community's outer borders.

Read together, 18 U.S.C. §§ 1151(a) and (b) employ a functional definition focusing on the federal purpose in recognizing or establishing a reasonably distinct location for the residence of tribal Indians under federal protection. This definition supplanted the earlier reliance on land title, which had become impractical owing to allotments, reservation openings and rights-of-way.

{19} The treatise raises the issue that there is some ambiguity in how Congress intended to treat fee land within § 1151(b) dependent Indian communities. Because § 1151(a) does specify how to treat fee land within a

reservation, we too read § 1151(a) and (b) together. We determine that a pueblo satisfying § 1151(b) is sufficiently similar to a reservation in § 1151(a) to merit identical treatment for the purposes of criminal jurisdiction. Congress has often referred to pueblos as reservations before and after the enactment of § 1151. One hundred years ago, before New Mexico obtained statehood, Congress exempted from taxes land "within Pueblo reservations or lands, in the Territory of New Mexico." H. Res. 17474, 58th Cong., 33 Stat. 1048, 1069 (1905). In 1910, in order to become a state, Congress required New Mexico to forever prohibit "introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico." H. Res. 18166, 61st Cong., 36 Stat. 557, 558 (1910). Two years later, Congress allowed wine for sacramental use "at any place within the Indian country or any Indian reservation, including the Pueblo Reservations in New Mexico." 25 U.S.C. § 253 (1912). Since then, Congress has consistently used the word "reservation" broadly to encompass pueblo land. Some legislation concerning Indian country in general, including § 1151, does not use the word "pueblo." Examples cover environmental laws, education, transportation, judicial administration, and economic activities. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1377(h)(1) (1987), ("'Federal Indian reservation' means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation;"); Indian Financing Act, 25 U.S.C. § 1452 (1974); Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b (1975); Indian Child Welfare Act, 25 U.S.C. § 1903 (1978); National Indian Forest Resources Management Act, 25 U.S.C. 3103 (1990); Federal Highway

Act, 23 U.S.C. § 101(a)(12) (1958); Indian Tribal Justice Act, 25 U.S.C. § 3653 (2000); Professional Boxing Safety Act of 1996, 15 U.S.C. § 6312 (1996); Consolidated Farm and Rural Development Act, 7 U.S.C. § 1985(e)(i)(A)(ii) (1996). The State does not provide any example of Congress treating a pueblo distinctly from a reservation, especially not for the purposes of criminal jurisdiction in Indian country.

{20} Courts have adopted a broad view of the term reservation. To reconcile the word choice of reservation versus pueblo, we note that in *United States v. McGowan,* 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938), the United States Supreme Court found the linguistic difference to be immaterial and instead looked to the protections afforded by the Federal government. *Id.* at 538-39, 58 S.Ct. 286 (examining "reservation" versus "colony"). In a more recent case specifically addressing what is a reservation for the purposes of § 1151(a), the Tenth Circuit Court of Appeals stated "official 'reservation' status is not dispositive" and that informal reservations are included in § 1151(a). *United States v. Roberts,* 185 F.3d 1125, 1131 (10th Cir. 1999). In *Ortiz,* 105 N.M. 308, 731 P.2d 1352, the New Mexico Court of Appeals reviewed a case in which the State charged an Indian defendant for a crime committed within a pueblo's exterior boundaries but also within the corporate limits of a non-Indian town. In holding that the State did not have jurisdiction, the court stated that, "land within the exterior boundaries of a Pueblo is indistinguishable from land lying within the exterior boundaries of an Indian reservation." *Id.* at 312, 731 P.2d at 1356. Our Court determined over 20 years ago that "Indian reservations and dependent Indian communities are not two distinct definitions of place, but definitions which largely

overlap." *Blatchford v. Gonzales,* 100 N.M. 333, 335, 670 P.2d 944, 946 (1983) (specifically addressing § 1151).

{21} Our state courts have previously determined that pueblos are Indian country when deciding a case with similar facts and with a similar question presented to the Court of Appeals. In 1996, the State indicted an Indian defendant for an alleged crime within the exterior boundaries of the defendant's pueblo, but either on private fee land or a public thoroughfare in a non-Indian town. *Ortiz,* 105 N.M. 308, 731 P.2d 1352. The Indian defendant challenged the State's jurisdiction to prosecute and the Court of Appeals wrote:

> Based on the relationship between the United States government and the Pueblo Indians, the Congressional action taken to confirm and hold in trust for the Pueblo Indians land granted them by the prior governments, and the unquestioned authority of Congress to enact legislation which affects that land, we are constrained to conclude that land lying within the exterior boundaries of an Indian Pueblo, such as the San Juan Pueblo, is "Indian country" within the meaning of Section 1151.

Id. at 312, 731 P.2d at 1356. The Court of Appeals held that the State did not have jurisdiction and remanded the case with instructions to dismiss the indictment. *Id.* at 312-13, 731 P.2d at 1356-57.

{22} Thus, given the overlapping nature of the terms reservation and pueblo and the overlapping nature of §§ 1151(a) and (b), we think it is fair to conclude, in the face of congressional silence, that the fee land within a § 1151(b) dependent Indian community is Indian country just like the fee land within a § 1151(a) reservation.

B. Congressional Intent to Change Status Under § 1151

{23} Now that we have determined that lands within the exterior boundaries of Taos and Pojoaque Pueblos are Indian country within the meanings given in § 1151, we next consider if Congress ever showed clear intent to extinguish Indian title to the alleged crime sites within Taos or Pojoaque Pueblos' exterior boundaries. *DeCoteau v. Dist. County Ct.*, 420 U.S. 425, 444, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) (holding that ambiguities are resolved in favor of Indians unless congressional intent is clear). The State argues that Congress has shown a clear intent to extinguish; Defendants Romero and Gutierrez argue that Congress has not diminished Indian country. We decide that Congress has not shown clear intent to extinguish Indian country status, so Indian country status for the privately-held parcels within Taos and Pojoaque Pueblos' exterior boundaries has not been extinguished.[3] Two issues require resolution in order to reach this conclusion. First, both cases necessitate that we determine if Indian country status is extinguished for parcels of private claim land within Indian country's exterior boundaries. Second, Defendant Romero's case asks that we decide if a

[3] The State specifically uses the word "extinguish" because that is the word used in the Pueblo Lands Act. Defendants use the word "diminish." The State argues that diminish is incorrect here because diminishment applies only to reservations, not dependent Indian communities. We disagree and take a broader view. For purposes of resolving whether the land in question is currently Indian country in general and beyond the State's criminal jurisdiction, the extinguish versus diminish debate is not significant.

non-Indian town's existence within the Indian pueblo alters Indian country status.

{24} We follow in the footsteps of the United States Supreme Court, which decided both these issues over 40 years ago in a case with substantially similar facts. In *Seymour,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346, Washington State prosecuted an Indian for a crime committed on Indian land that the Indian defendant argued was Indian country within § 1151. Washington State argued that Indian country no longer existed because the land was held in fee by a non-Indian, which is New Mexico State's argument in regard to Defendant Gutierrez and Pojoaque Pueblo. Washington State also argued that the land was subject to state jurisdiction because a town had been established on the site, which is New Mexico State's argument in regard to Defendant Romero and Taos Pueblo. The United States Supreme Court rejected both arguments and found that the land in question remained Indian country within § 1151.

> The contention is that, even though the reservation was not dissolved completely by the Act permitting non-Indian settlers to come upon it, its limits would be diminished by the actual purchase of land within it by non-Indians because land owned in fee by non-Indians cannot be said to be reserved for Indians. This contention is not entirely implausible on its face and, indeed, at one time had the support of distinguished commentators on Indian Law. But the issue has since been squarely put to rest by congressional enactment of the currently prevailing definition of Indian country in § 1151 to include 'all land within the limits of any Indian reservation under

> the jurisdiction of the United States Government, notwithstanding the issuance of any patent. . . .'

Id. at 357-58, 82 S.Ct. 424 (footnote omitted). Divesting a reservation of its land is such a drastic measure that it can only be accomplished by Congress, not by individual land sales. *Solem v. Bartlett,* 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). In regard to the town established within the exterior boundaries of Indian country, the State here, like the State in *Seymour,* unpersuasively argues that § 1151 reduces federal responsibility for Indians who live within the pueblo simply because non-Indians have moved in. *Seymour,* 368 U.S. at 359, 82 S.Ct. 424. "Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem,* 465 U.S. at 470, 104 S.Ct. 1161. Absent a clear congressional statement to change the status, the fact that the land is encompassed by the pueblo controls the jurisdictional issue. *Ortiz,* 105 N.M. at 312, 731 P.2d at 1356. In sum, location within the exterior boundaries matters more than who holds title.

{25} We next consider congressional action that could have extinguished Indian country status. Case law demands that any act on which the State relies "provide substantial and compelling evidence of a congressional intention to diminish Indian lands . . . " *Solem,* 465 U.S. at 472, 104 S.Ct. 1161. The precise statutory language used to open Indian lands serves as the best evidence of intent. *Id.* at 470, 104 S.Ct. 1161. The State argues that Congress has given an explicit indication of extinguishment in the Pueblo Lands Act, which is "An Act To quiet the title to

lands within Pueblo Indian land grants, and for other purposes." S. 2932, 68th Cong., 43 Stat. 636 (1924). We turn to the language of the Pueblo Lands Act. The Act specifically mentions title, but does not mention tribal or federal versus state jurisdiction, nor ever allude to a change in the land's Indian country status. The Act does allow for "a suit to quiet title to the lands described . . . as Indian lands the Indian title to which is determined . . . not to have been extinguished." 43 Stat. at 637. Due to the lack of substantial and compelling evidence of congressional intent to change Indian country status, we must reject the State's overly-broad interpretation that the Pueblo Lands Act extinguishes Indian country status merely by allowing non-Indians to have fee title to certain parcels. The Pueblo Lands Act falls far short of being "substantial and compelling evidence" as required by *Solem*. Thus, "we are bound by our traditional solicitude for the Indian tribes to rule that . . . the old reservation boundaries survived the opening." *Solem,* 465 U.S. at 472, 104 S.Ct. 1161. The fact that Taos Town ended up within the exterior boundaries of Taos Pueblo does not diminish or extinguish Indian country; nor does the individually owned private claim land in the middle of Pojoaque Pueblo affect Indian country status there.

IV. CONCLUSION

{26} The privately-held fee lands within the exterior boundaries of both Taos and Pojoaque Pueblos are Indian country within the meaning of § 1151(b) and Congress has not extinguished Indian country status. Therefore, the lands in question remain Indian country, and the State does not have jurisdiction to prosecute the alleged crimes

occurring there. The Court of Appeals is reversed and the district court is affirmed in both cases.

{27} **IT IS SO ORDERED.**

WE CONCUR: RICHARD C. BOSSON, Chief Justice and PAMELA B. MINZNER, Justice, PETRA JIMENEZ MAES, Justice (specially concurring), EDWARD L. CHÁVEZ, Justice (specially concurring).

CHÁVEZ, Justice (specially concurring).

{28} I agree with the majority that the State has no jurisdiction in these cases. In each case the accused is an enrolled member of the pueblo, which satisfies the definition of Indian within the Major Crimes Act, 18 U.S.C. § 1153, and the crimes occurred within the exterior boundaries of the pueblo. I share the view that "Congress and the United States Supreme Court have established that pueblo lands are Indian country." Maj. Op. ¶ 13. The United States Supreme Court has clearly stated that pueblos are dependent Indian communities:

> As before indicated, by an uniform course of action beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and . . . this assertion of guardianship over them cannot be said to be arbitrary, but must be regarded as both authorized and controlling.

United States v. Sandoval, 231 U.S. 28, 47, 34 S.Ct. 1, 58 L.Ed. 107 (1913). Therefore, the land within the exterior boundaries of New Mexico pueblos fits squarely within the

definition of dependent Indian community as codified in 18 U.S.C. § 1151(b).

{29} I write separately because I respectfully believe the discussion of *Alaska v. Native Vill. of Venetie Tribal Gov't,* 522 U.S. 520, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998), goes beyond what is necessary for resolution of this case. *Venetie,* insofar as it mentioned the pueblos, simply confirmed what was said in *Sandoval,* that the pueblos were dependent Indian communities over which Congress "could exercise jurisdiction over the Pueblo lands, under its general power over 'all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired.'" *Venetie,* 522 U.S. at 528, 118 S.Ct. 948 (quoting *Sandoval,* 231 U.S. at 46, 34 S.Ct. 1). The *Venetie* analysis and its two prong test is not necessary when a crime is committed within the exterior boundaries of a New Mexico pueblo, since pueblos have already been recognized as Indian country. It is only when a crime is committed within lands of questionable Indian country status that the *Venetie* analysis is necessary. *Venetie,* 522 U.S. at 530, 118 S.Ct. 948 (stating that section 1151 does not alter the definitions of Indian country as described in earlier cases, including *Sandoval*).

{30} Of particular concern are the suggestions in the majority opinion that under *Venetie* fact-finding is or may be required to determine whether a pueblo has been set aside and under federal superintendence. *See* Maj. Op. ¶ 15 (referring to district judge's fact findings as also satisfying the set aside requirement), and ¶ 17 (which acknowledges a presumption of federal superintendence based on federal and state cases recognizing federal superintendence of pueblos, but goes on to suggest fact-finding may become necessary). In my opinion the only

fact-finding necessary for the inquiry into criminal jurisdiction on pueblo lands is: a) whether the alleged crime was committed within the exterior boundaries of a pueblo, and b) whether the accused is an Indian within the meaning of the Major Crimes Act, 18 U.S.C. § 1153. If an analysis were required under *Venetie* I would conclude that the "set-aside" of the pueblo lands by the federal government occurred at the time it confirmed the pueblo land grants. Act of Dec. 22, 1858, 35th Congress, 11 Stat. 374 (1859). I would also conclude that "superintending control" of the pueblos has been shown through the Pueblo Lands Act, where Congress exercised "its sovereign capacity as guardian of said Pueblo Indians." Pueblo Lands Act of June 7, 1924, ch. 331, 43 Stat. 636. I would not require our courts to conduct an evidentiary hearing when the parties agree, as they did in both these cases, that the crime occurred within the exterior boundaries of a pueblo and the accused meets the requirements of the Major Crimes Act, 18 U.S.C. § 1153. "If an extensive factual inquiry is necessary to make a jurisdictional determination ... criminal trials will be delayed." *State v. Ortiz,* 105 N.M. 308, 312, 731 P.2d 1352, 1356 (Ct.App.1986).

{31} I also respectfully disagree with the majority's use of the diminishment or extinguishment analysis as applied to the pueblos. I am not persuaded that Congress may unilaterally alter pueblo boundaries the way it may diminish or extinguish reservation lands. Because Congress creates reservations,[4] it also retains the authority to

[4] *See* Creation of Indian reservations, 25 U.S.C. § 211 (1918) (stating "[N]o Indian reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona, except by Act of Congress."); *see also* New Indian reservations, 25 U.S.C. § 467 (1934) (authorizing the

(Continued on following page)

diminish or extinguish the reservation and dedicate the land to public use. *See Hagen v. Utah,* 510 U.S. 399, 402-415, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) (describing a Congressional Act of 1864 setting apart lands for the Uintah Valley Reservation and subsequent diminishment of that reservation by congressional act and resulting change in status of criminal jurisdiction in lands restored to public domain). Unlike reservations created by Congress, Congress relinquished all title and claim of the United States to the lands within the pueblos when it confirmed the pueblo grants. Act of Dec. 22, 1858, 35th Congress., 11 Stat. 374 (1859). This is one of the unique, historical, and still significant differences between the pueblo lands and the reservations of other Indian tribes. Clearly, alteration of reservation boundaries by Congress will change the jurisdictional status of those lands as illustrated in *Venetie* and *Hagen.* Land within the exterior boundaries of the pueblos is Indian country under 18 U.S.C. § 1151 unless Congress has given clear indication of its intent to change its jurisdictional status, regardless of the title of the land within the boundaries.

{32} There is no evidence that Congress has changed criminal jurisdiction within the exterior boundaries of any pueblo. In fact, the history of the Pueblo Lands Act irrefutably evinces congressional intent not to change criminal jurisdiction within the exterior boundaries of the pueblos. The original version of the Act, known as the Bursum Bill, contained this language:

Secretary of the Interior to proclaim new Indian reservations and to add lands to existing reservations).

> SEC. 3. That the State of New Mexico and the courts thereof shall have jurisdiction over all lands and in all questions arising in relation thereto, which shall have been segregated from any of the pueblo grants hereinbefore enumerated by final decree, as well as also over all lands and as to all questions or controversies arising in relation thereto which have ceased to be reservations as hereinbefore provided, or which shall have been legally sold or disposed of by any of said pueblos or any Indian or Indians thereof, as now or hereafter provided by law.

62 Cong. Rec. 12324 (1922). This version of the bill was defeated following strong national dissent to the Bursum Bill. *See* 138 Cong. Rec. E328-01 (1992) (describing a 1922 meeting of the All-Pueblo Council gathered at Santo Domingo Pueblo to protest the Bursum Bill). The final version of the Pueblo Lands Act deleted this jurisdictional section despite considerable debate, as illustrated by the following exchange during the 1923 congressional hearings:

> Senator LENROOT. It is agreed, then, that section 3 may be eliminated?
>
> Commissioner BURKE. Yes.
>
> Senator JONES of New Mexico. I do not know about that, Mr. Chairman. I rather think there is a situation there which ought to be dealt with. The pueblo grants, according to their outlying boundaries, are made Indian country by the enabling act, and because we might segregate those lands as between the individual occupants, as between the Indian and the non-Indian, I do not think it follows what was given to the non-Indians

> would cease to be Indian country in the absence of some legislation on the subject.
>
> Senator BURSUM. What about criminal jurisdiction? Might not that be involved?
>
> Senator JONES of New Mexico. That is what I refer to, the question of eliminating them from what we understand by the term "Indian country." I do not think, just offhand, we ought to eliminate that section. I believe there is something there we ought to think about. But we can do that later.

Hearings on S.3855 and S.4223 Before the Subcomm. of the Senate Comm. on Public Lands and Surveys, 67th Cong., 4th Sess. 89 (1923). Congress did not act "later" to remove Indian country status from any of the lands within the exterior boundaries of the pueblos, and clearly did not alter criminal jurisdiction affecting Pueblos. It was not until recently that Congress amended the Pueblo Lands Act to address the jurisdictional issue. Maj. Op. n. 1. Congress confirmed criminal jurisdiction in the Pueblos and the United States and specifically noted that the State of New Mexico only has jurisdiction over an offense committed by a person who is not a member of a Pueblo or an Indian, provided the offense is not subject to the jurisdiction of the United States. Pueblo Lands Act of 1924, ch. 331, 43 Stat. 636, *amended by* S. 279, 109th Cong., 119 Stat. 2573 (2005). Thus, both the Pueblo Lands Act and its legislative history fail to provide substantial and compelling evidence of congressional intent to alter the criminal jurisdiction applicable to crimes committed on pueblo lands by tribal members.

{33} Because I agree that the State does not have jurisdiction over criminal offenses committed by tribal

members within the exterior boundaries of pueblos, I concur in the result reached by the majority.

I CONCUR: PETRA JIMENEZ MAES, Justice.

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

vs. **No. 24,731**

MATTHEW GUTIERREZ,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT
OF SANTA FE COUNTY
Michael E. Vigil, District Judge

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MEMORANDUM OPINION

(Filed May 20, 2004)

ALARID, Judge.

The State appeals the district court order dismissing charges against Defendant for lack of subject matter

jurisdiction. On appeal, the State argues that it has criminal jurisdiction to prosecute Defendant, an enrolled member of the Pojoaque Pueblo, for a crime committed on privately owned land within the original exterior boundaries of the Pojoaque Pueblo. [DS 3] Defendant filed a motion to certify the case to the New Mexico Supreme Court. Our calendar notice denied Defendant's motion to certify and proposed to reverse the district court order dismissing the State's charges. Defendant filed a timely memorandum in opposition to our notice. Unpersuaded by Defendant's arguments, we reverse the district court.

In his memorandum in opposition, Defendant again urges us to certify this case to the Supreme Court on the grounds that this case presents a more factually developed record than that available in *State v. Romero*, 2004-NMCA-012, ___ N.M. ___, 84 P.3d 670, the controlling case, which the Supreme Court has granted certiorari to decide. We again deny Defendant's request to certify this case and note that Defendant may wish to present his arguments to the Supreme Court in a petition for writ of certiorari. Because Defendant does not persuade us to deviate from precedent, we apply *Romero* to the case at hand and hold that the State has criminal jurisdiction to prosecute Defendant.

In *Romero*, we determined that criminal jurisdiction turns on whether the land on which the crime was committed is a "dependent Indian Community" in "Indian Country" as defined by 18 U.S.C. § 1151(b)(2000). *Romero*, 2004-NMCA-012, ¶ 9 (stating that "[f]or the State to prevail, we must be persuaded that [the land at issue] is not located within any of the three categories of lands comprising Indian country set out in § 1151"). The record

in this case demonstrates that the land on which the crime occurred is within the boundaries of the Pojoaque Pueblo, but is no longer owned by the Pueblo. [RP 295 FOF 9] As a result of the Pueblo Lands Act of 1924, the land was deeded to the Garcia family and is now owned in fee by Ben Garcia, a non-Indian. [RP 295 FOF 10-12] We held that the Pueblo Lands Act evinces a congressional intent to alter the jurisdictional status of land where Indian title was extinguished. *Romero*, 2004-NMCA-012, ¶ 17. Thus, we concluded, privately owned land within the exterior boundaries of a Pueblo is not "Indian Country" as contemplated by 18 U.S.C. § 1151(b) (2000). Because the land on which the crime occurred is not "Indian Country," we hold that the State has jurisdiction to prosecute Defendant.

For the reasons stated above and those stated in our notice of proposed disposition, we propose to reverse the district court order dismissing the case for lack of subject matter jurisdiction.

IT IS SO ORDERED.

/s/ A. Joseph Alarid
A. JOSEPH ALARID, Judge

WE CONCUR:

/s/ Celia Foy Castillo
CELIA FOY CASTILLO, Judge

/s/ Ira Robinson
IRA ROBINSON, Judge

135 N.M. 53, 84 P.3d 670

Court of Appeals of New Mexico.
STATE of New Mexico, Plaintiff-Appellant,
v.
Del E. ROMERO, Defendant-Appellee.
No. 22,836.

Nov. 11, 2003.
Certiorari Granted No. 27,411, Jan. 20, 2004.

Patricia A. Madrid, Attorney General, Margaret McLean, Assistant Attorney General, Santa Fe, NM, for Appellant.

John B. Bigelow, Chief Public Defender, Laurel A. Knowles, Assistant Appellate Defender, Santa Fe, NM, for Appellee.

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Frank A. Demolli, Pueblo of Pojoaque Legal Department, Santa Fe, NM, for Amicus Curiae, Pueblo of Pojoaque.

OPINION

ALARID, Judge.

{1} This case presents a question of the State's jurisdiction to prosecute a member of Taos Pueblo charged with committing an aggravated battery upon another member of Taos Pueblo on land located within the original boundaries of the land grant from the King of Spain to Taos Pueblo, but which is now part of the town of Taos, New Mexico. We hold that by operation of federal law, the

land on which the alleged crime occurred is no longer Indian country, and that the State has jurisdiction to prosecute Defendant.

BACKGROUND

{2} Defendant-Appellee, Del E. Romero, was indicted by a Taos County grand jury on one count of aggravated battery, stemming from an incident at the Pueblo Allegre Mall in the town of Taos, New Mexico. Defendant moved to dismiss the charge against him on the ground that he is an Indian, that the Pueblo Allegre Mall is located in Indian country, and that New Mexico lacked subject matter jurisdiction to prosecute criminal charges against an Indian for an offense committed in Indian country. Defendant requested an evidentiary hearing on his motion to dismiss. The State filed a short response asserting that the Pueblo Allegre Mall is "within the geographical boundaries of the Town of Taos, and outside the exterior boundaries of the Taos Pueblo."

{3} The trial court held an evidentiary hearing. Defendant and the State stipulated that both Defendant and the alleged victim are members of Taos Pueblo. The evidence presented to the trial court included various maps of the town of Taos and the lands surrounding Taos Pueblo.

{4} Defendant, citing *State v. Ortiz,* 105 N.M. 308, 731 P.2d 1352 (Ct.App.1986), argued that federal law preempted state criminal jurisdiction in Indian country. According to Defendant, the Pueblo Allegre Mall is located on land that was owned by Taos Pueblo at the time New Mexico was admitted as a state, and therefore is included within the definition of Indian country set out in Article

XXI, Section 8 of the New Mexico Constitution: "lands owned or occupied by [the Pueblo Indians] on the twentieth day of June, nineteen hundred and ten, or which are occupied by them at the time of the admission of New Mexico as a state."

{5} The State, referring to a plat prepared by the Pueblo Lands Board, argued that Pueblo title to the tract on which the Pueblo Allegre Mall is located had been extinguished pursuant to the Pueblo Lands Act, ch. 331, 43 Stat. 636 (1924) (the PLA).

{6} In a letter decision, the trial court found that the Pueblo Allegre Mall is located on privately owned property within the town limits of Taos, in an area "within the original exterior boundaries of the Taos Pueblo Grant." The trial court further found that Pueblo title to the land underlying the Pueblo Allegre Mall was "extinguished" pursuant to the PLA. Applying *Ortiz,* the trial court held that extinguishment of Pueblo title pursuant to the PLA did not "diminish or change" the boundaries of Taos Pueblo. The trial court concluded that the State lacked subject matter jurisdiction. The trial court entered a separate order of dismissal, incorporating its letter decision.

{7} The State filed a timely notice of appeal.

DISCUSSION

{8} Under federal law, the United States has exclusive jurisdiction to prosecute certain serious offenses committed by Indians within Indian country. 18 U.S.C. § 1153 (2000); *Ortiz,* 105 N.M. at 310, 731 P.2d at 1354 (discussing exclusive federal jurisdiction under Major

Crimes Act). There is no dispute that Defendant is an enrolled member of Taos Pueblo, and that the offense with which he is charged-aggravated battery causing serious bodily harm-is one of the offenses listed in § 1153. Further, as previously noted, the trial court found that the Pueblo Allegre Mall is located on privately owned property within the town limits of Taos, in an area "within the original exterior boundaries of the Taos Pueblo Grant," and that Pueblo title to the land underlying the Pueblo Allegre Mall was extinguished pursuant to the PLA. These findings are not attacked by either party to this appeal and we therefore accept them as operative facts for purposes of this appeal. This appeal ultimately turns upon a question of law: did extinguishment of the Pueblo title to the lands underlying the town of Taos pursuant to the PLA permanently change the jurisdictional status of this land? We conclude that it did, and that the 926 acres underlying the town of Taos as to which title was quieted against Taos Pueblo pursuant to the PLA are not Indian country. Accordingly, the State may prosecute Defendant for his alleged offense.

Indian Country Defined

{9} In 1948 Congress enacted the current definition of Indian country:

> "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States . . . , and (c) all Indian allotments, the Indian titles to

> which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2000). For the State to prevail, we must be persuaded that Pueblo Allegre Mall is not located within any of the three categories of lands comprising Indian country set out in § 1151.

{10} There is no serious question as to the inapplicability of Subsection (c). Allotment is a term of art in Indian law "referring to land owned by individual Indians and either held in trust by the United States or subject to a statutory restriction on alienation." *Felix S. Cohen's Handbook of Federal Indian Law* 40 (Rennard Strickland, et al., eds. 1982) (hereinafter "*Cohen*"). The lands comprising the Taos Pueblo land grant are owned communally, and therefore are not allotments. *See United States v. Chavez,* 290 U.S. 357, 360, 54 S.Ct. 217, 78 L.Ed. 360 (1933) (observing that the lands of Isleta Pueblo, "like those of other pueblos of New Mexico" are owned communally).

{11} We are also satisfied that Subsection (a) is not applicable in the present case. At one time it was generally accepted, and we so held, that the categories of Indian lands described in Subsections (a) and (b) were largely interchangeable for purposes of jurisdictional analysis. *Cohen* at 38; *Ortiz,* 105 N.M. at 310, 731 P.2d at 1354. However, that position is no longer tenable. In *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998), the United States Supreme Court held that dependent Indian communities "refers to a limited category of Indian lands that are *neither reservations* nor allotments." *Id.* at 527 (emphasis added). There can be no question that the Taos Pueblo

land grant is a dependent Indian community: the very term "dependent Indian communities" was adopted in *United States v. Sandoval,* 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913), to describe New Mexico Pueblos. Indeed, "[t]he entire text of § 1151(b), and not just the term 'dependent Indian communities,' is taken virtually verbatim from *Sandoval.*" *Venetie,* 522 U.S. at 530, 118 S.Ct. 948; *see also Cohen* at 34 (characterizing Subsection (b) as "codifying" the phrase "dependent Indian communities"). As a dependent Indian community the Taos Pueblo land grant by definition is not an Indian reservation.[1] Applying *Venetie,* we hold that if the situs of the alleged crime in this case is Indian country, it is by operation of Subsection 1151(b).

The PLA

{12} Early decisions of the territorial supreme court and the United States Supreme Court held that Pueblo Indians of New Mexico, unlike other Indians, were not in a state of tutelage and that neither the Pueblo Indians nor their property were under the guardianship of the federal government. *E.g., United States v. Joseph,* 94 U.S. 614, 24 L.Ed. 295 (1876). As a result of these cases, it was understood that Pueblo Indians could convey good title to Pueblo lands notwithstanding federal law generally restricting the alienation of Indian lands. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana,* 472 U.S. 237, 240-42, 105 S.Ct.

[1] We are aware that the United States government has set aside public lands in trust for the benefit of the Indians of Taos Pueblo. Pub.L. 91-55o, 84 Stat. 1437 (1970). The present appeal does not concern a crime scene located within the limits of these additional lands.

2587, 86 L.Ed.2d 168 (1985). "Relying on the rule established in *Joseph,* 3,000 non-Indians had acquired putative ownership of parcels of real estate located inside the boundaries of the Pueblo land grants." *Id.* at 243.

{13} In 1910 Congress enacted enabling legislation contemplating the admission of New Mexico as a state. New Mexico Enabling Act, ch. 310, 36 Stat. 557 (1910). As a condition of admission, Congress required the people of New Mexico to enact "an ordinance irrevocable without the consent of the United States and the people [of New Mexico]" recognizing that lands "now owned or occupied by the Pueblo Indians of New Mexico" were Indian country.[2] New Mexico Enabling Act, ch. 310, § 2, 36 Stat. at 558. In view of the *Joseph* decision, there was a substantial question as to whether Congress had the authority under the Indian Commerce Clause to define Pueblo lands as Indian country. In *Sandoval,* the United States Supreme Court upheld the Enabling Act as a valid exercise of Congress's power to regulate commerce with Indian tribes. The Court held that Pueblo Indians are "Indians" within the meaning of the Indian Commerce Clause and that the Pueblo Indians, like other Indians, were to be viewed as wards of the federal government. *Sandoval,* 231 U.S. at 46-47, 34 S.Ct. 1. The Supreme Court characterized Section 2 of the Enabling Act as having "prescribed, in substance, that the lands then owned or occupied by the

[2] In 1910, when Congress enacted the Enabling Act, the *Joseph* decision was still good law. Thus, both Congress in enacting the Enabling Act and the people of New Mexico in acceding to its terms would not necessarily have understood "all lands *now* owned or occupied by the Pueblo Indians" to have included lands within the original Pueblo land grants that were then owned and occupied by non-Indians.

Pueblo Indians should be deemed and treated as Indian country within the meaning of [federal law prohibiting the introduction of intoxicating liquor into Indian country] *and of kindred legislation by Congress.*" *Id.* at 36-37, 34 S.Ct. 1 (emphasis added; footnote omitted).

Sandoval's holding that Pueblo Indians were wards of the federal government generally subject to federal laws governing Indians called into question the validity of the *Joseph* decision, and clouded the title of thousands of non-Indians who had acquired lands within the boundaries of the Pueblo land grants without the approval of the federal government. *Pueblo of Santa Ana,* 472 U.S. at 243-44, 105 S.Ct. 2587.

[15] Congress responded to the problem of claims by non-Indians to lands within Pueblo land grants by enacting the PLA. The PLA established the Pueblo Lands Board to investigate the state of title of lands within the boundaries of the various Pueblos, and provided a mechanism whereby Pueblo title to tracts of land could be extinguished in favor of non-Indian claimants under prescribed conditions. *Pueblo of Santa Ana,* 472 U.S. at 244-45, 105 S.Ct. 2587. The Secretary of the Interior was to file "field notes and plat for each [P]ueblo . . . showing the lands to which the Indian title has been extinguished." PLA, ch. 331, § 13, 43 Stat. at 640. Certified copies of these field notes were to be "accepted in any court as competent and conclusive evidence of the *extinguishment of all the right, title, and interest of the Indians in and to the lands so described . . . and of any claim of the United States in or to the same.*" *Id.* (emphasis added). A decree in favor of a non-Indian claimant pursuant to the PLA had "the effect of a deed of quitclaim as against the United States and said Indians." PLA, ch. 331, § 5, 43 Stat. at 637. Among the

Pueblo lands as to which Pueblo title was extinguished by the PLA were 926 acres occupied by the town of Taos, which intruded into the southwest corner of the original Taos Pueblo grant. *See generally United States v. Pueblo of Taos,* 33 Ind. Cl. Comm. 82 (1974), *aff'd,* 207 Ct.Cl. 53, 515 F.2d 1404 (1975).

[16] Congress's provision in the PLA for the extinguishment of Pueblo title is particularly significant because prior to the enactment of § 1151 in 1948 "Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest." *Solem v. Bartlett,* 465 U.S. 463, 468, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). In 1834 Congress had enacted legislation regulating commerce with Indians. Ch. 161, 4 Stat. 729 (1834). Section 1 of the 1834 act contained the following definition of "Indian country":

> [A]ll that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state *to which the Indian title has not been extinguished,* for the purposes of this act, be taken and deemed to be the Indian country.

4 Stat. 729 (emphasis added). Although Section 1 of the 1834 act was repealed in 1874, *Cohen* at 31, no new definition of Indian country was enacted until 1948,[3] and

[3] Congress maintained a statutory linkage between Indian title and federal jurisdiction in the enabling acts for states admitted between 1889 and 1959. *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. 463, 479-80, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979). Typical of these acts, § 2 of the New Mexico Enabling Act provides "that until the title of such Indian or Indian

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the United States Supreme Court continued to refer to the 1834 definition even after its repeal. *Clairmont v. United States,* 225 U.S. 551, 557, 32 S.Ct. 787, 56 L.Ed. 1201 (1912); *see also Cohen* at 35 (observing that "[t]he 1834 statutory definition of Indian country was expressly tied to Indian land title and the Supreme Court had not rejected this requirement before passage of [§ 1151]"). Relying on the 1834 definition of Indian country as lands "to which the Indian title has not been extinguished," the United States Supreme Court repeatedly stated that upon extinguishment of Indian title, status as Indian country ceases. *E.g., Bates v. Clark,* 95 U.S. 204, 24 L.Ed. 471 (1877). Extinguishment of Indian title restored the land in question to the jurisdiction of the state (or territory) in which the land was located *without further action by Congress. Clairmont,* 225 U.S. at 558, 32 S.Ct. 787. This rule "govern[ed] in the absence of a different provision by treaty or by act of Congress." *Clairmont,* 225 U.S. at 559, 32 S.Ct. 787.

{17} Defendant and Amicus Taos Pueblo argue that in enacting the PLA Congress intended to extinguish title to Pueblo lands without altering their jurisdictional status. This argument "contradicts the common understanding of the time" that tribal ownership was a component of status as Indian country, *South Dakota v. Yankton*

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tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States." Although the dissent correctly notes that the "[t]he Enabling Act recognized federal dominance and governance over lands then held or occupied by Pueblo Indians," Dissent, ¶ 39, it overlooks the language in § 2 by which Congress expressly linked federal dominance and governance of Indian lands to non-extinguishment of Indian title.

Sioux Tribe, 522 U.S. 329, 346, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), and that upon extinguishment of Indian title the land in question ceased to be Indian country without the necessity of further action by Congress, *Clairmont,* 225 U.S. at 558, 32 S.Ct. 787. We construe the PLA "in light of the common notions of the day and the assumptions of those who drafted [it]." *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 206, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). We find nothing in the PLA suggesting that Congress intended to depart from the established rule that status as Indian country ceases upon extinguishment of Indian title. We conclude that in enacting the PLA, Congress clearly understood that it was altering the jurisdictional status of those lands as to which title was quieted in favor of a non-Indian, and that unless Congress subsequently acted to restore the Indian country status of these lands they remain outside Indian country.

Effects of § 1151 on the Jurisdictional Status of Non-Indian Lands Within a Pueblo Land Grant

{18} Defendant argues that Indian title is no longer dispositive of status as Indian country. According to Defendant, § 1151 uncoupled status as Indian country from Indian title. The flaw in this argument is the erroneous assumption that Congress uncoupled Indian title and status as Indian country in all three categories of Indian country set out in § 1151.

{19} A close examination of § 1151 reveals that Congress has expressly uncoupled Indian title and status as Indian country only in Subsection (a). Subsection (a) codifies the holding of such cases as *Kills Plenty v. United States,* 133 F.2d 292 (1943), which had construed the

phrase "within any Indian reservation" to confer federal criminal jurisdiction over crimes committed on land within reservation boundaries notwithstanding the fact that the crime scene was located on land that had been patented in fee to non-Indians. *See* § 1151, Historical and Statutory Notes. Some lower courts, however, had reached a contrary result. *Cohen* at 36. When Congress enacted § 1151 in 1948, it eliminated any doubt that Subsection (a) represents a statutory departure from the traditional rule tying status as Indian country to Indian title by adding the additional language, "all lands" and "notwithstanding the issuance of any patent." *Cohen* at 35, 37. However, any suggestion that Congress generally intended to abrogate the rule tying status as Indian country to Indian title is refuted by Subsection (c), which expressly maintains the linkage between Indian title and status as Indian country. *See Pittsburg & Midway Coal Mining Co. v. Yazzie,* 909 F.2d 1387, 1421-22 (10th Cir. 1990) (recognizing that Congress has authorized "checkerboard jurisdiction" outside reservations in Subsections 1151(b) and (c)).

{20} Subsection (b) does not employ the phrases "all lands within the limits of any Indian reservation" and "notwithstanding the issuance of any patent" which accomplish the uncoupling of Indian title and status as Indian country in Subsection (a). As noted in *Venetie,* Subsection (b) is a codification of a different line of authority and is largely drawn from the Supreme Court's discussion of Pueblo Indians in *Sandoval.*

{21} We find support for the conclusion that Congress intended Subsection 1151(b) to maintain the linkage between Pueblo title and status as Indian country in the legislative history of the Santo Domingo Pueblo Claims Settlement Act of 2000. Pub.L. 106-425, 114 Stat. 1890

(2000) [codified at 25 U.S.C. §§ 1777 through 1777e (2000)] (SDPCSA). Congress enacted the SDPCSA as enabling legislation for the settlement of longstanding disputes over lands claimed by Santo Domingo Pueblo, including a dispute arising out of a decision of the Pueblo Lands Board which purported to extinguish Pueblo title to 27,000 acres within the Santo Domingo Pueblo Grant. SDPCSA, § 2. Section 6 of the SDPCSA, "Affirmation of accurate boundaries of Santo Domingo Pueblo Grant," provides:

> (a) In general
>
> The boundaries of the Santo Domingo Pueblo Grant, as determined by the 1907 Hall-Joy Survey, confirmed in the Report of the Pueblo Lands Board, dated December 28, 1927, are hereby declared to be the current boundaries of the Grant and *any lands currently owned by or on behalf of the Pueblo within such boundaries, or any lands hereinafter acquired by the Pueblo within the Grant in fee absolute, shall be considered to be Indian country within the meaning of section 1151 of title 18.*
>
> (b) Limitation
>
> *Any lands or interests in lands within the Santo Domingo Pueblo Grant, that are not owned or acquired by the Pueblo, shall not be treated as Indian country within the meaning of section 1151 of title 18.*

SDPCSA, § 6 (emphasis added). Read together, Subsections 6(a) and (b) clearly link status as Indian country to Pueblo title.

{22} A statement by Congress that a subsequent act is intended merely to "clarify" earlier legislation supports

the inference that Congress understood the later legislation as continuing earlier law. *Bell v. New Jersey,* 461 U.S. 773, 789, 103 S.Ct. 2187, 76 L.Ed.2d 312 (1983). Subsection 2(b)(3) of the SDPCSA recites that one of the purposes of the act was "to clarify governmental jurisdiction over the lands within the Pueblo's land claim area." 25 U.S.C. § 1777(b)(3).

{23} The inference that a subsequent statute merely restates pre-existing law is strengthened when the legislative history of the statute contains a statement disclaiming any intention to significantly alter pre-existing law. *Bell,* 461 U.S. at 789, 103 S.Ct. 2187. The legislative history of the SDPCSA includes the statement that the SDPCSA "make[s] *no changes* in existing law." S. Rep. 106-506 at 13 (2000) (emphasis added).

{24} If § 6 of the SDPCSA merely clarifies pre-existing law without changing that law, then Subsection 1151(b) itself must have been understood by Congress as adopting a rule linking status as Indian country to non-extinguishment of Pueblo title. Congress' subsequent interpretation of Subsection 1151(b) in the context of the SDPCSA, while not definitive, nevertheless has "persuasive value." *Bell,* 461 U.S. at 784, 103 S.Ct. 2187. We consider it unlikely that Congress would have created a special rule solely applicable to one Pueblo, further complicating jurisdictional analysis. We consider it far more likely that, as the legislative history of the SDPCSA states, Congress merely was clarifying a rule that it understood already applied to Pueblo lands by operation of Subsection 1151(b).

{25} Defendant's case for exclusive federal jurisdiction is based on the misconception that § 1151 has completely

abrogated the traditional rule linking status as Indian country to Indian title. While we agree that Subsection (a) has displaced *Bates-Clairmont* with respect to crime scenes "within the limits of any Indian reservation," a New Mexico Pueblo land grant is not a "reservation" within the meaning of Subsection (a). Because it is undisputed that the crime scene in the present case is located on land to which Pueblo title has been extinguished, the crime scene is not Indian country for purposes of § 1153 and the State retains jurisdiction to prosecute Defendant.

{26} Our analysis is consistent with the United State's Supreme Court's decision in *Venetie*. To constitute a dependent Indian community, the land in question must satisfy two requirements: "first, [the land] must have been set aside by the Federal Government for the use of the Indians as Indian land; second, [it] must be under federal superintendence." 522 U.S. at 527, 118 S.Ct. 948. As we have noted above, a PLA decree in favor of a non-Indian and against a Pueblo extinguished *both* the Pueblo's and the United States' title. Where neither the United States (as guardian) nor the Pueblo (as ward) retain an interest in the land in question, there is nothing that can be said to be set aside for the use of Indians. *See Seymour v. Superintendent of Wash. State Penitentiary,* 368 U.S. 351, 357-58, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962) (suggesting that but for enactment of Subsection 1151(a) land within reservation owned in fee by non-Indian would not be Indian country because it "cannot be said to be reserved for Indians"); *United States v. Conway,* 175 U.S. 60, 68, 20 S.Ct. 13, 44 L.Ed. 72 (1899) (observing that grant by United States of property it does not own is "a simple nullity"). Land to which title has been quieted in favor of a

non-Indian under the PLA cannot satisfy the set-aside prong of *Venetie*. 522 U.S. at 527, 118 S.Ct. 948.

{27} We are aware of the canon of construction that "statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit." *Chickasaw Nation v. United States,* 534 U.S. 84, 88, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001) (internal quotation marks and citations omitted). We will assume that it is to the Pueblos' benefit to have Subsection (b) construed so that the status as Indian country of Pueblo lands is not tied to Pueblo title. However, canons of construction are "guides that 'need not be conclusive.'" *Id.* at 94, 122 S.Ct. 528 (quoting *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 115, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001)). "[O]ther circumstances evidencing congressional intent can overcome their force." *Id.* at 94, 122 S.Ct. 528. We believe that such "other circumstances" are present here.

{28} We recognize that previously we have blurred the distinction between the definitions contained in Subsections (a) and (b). *See Ortiz,* 105 N.M. at 311-12, 731 P.2d at 1355-56. We did so prior to the Supreme Court's pronouncements in *Venetie* and without the benefit of Congress' subsequent legislative construction of Subsection 1151(b) in the SDPCSA. As the present case makes clear, there are potentially dispositive differences between the scope of Subsections (a) and (b). We therefore disavow *Ortiz* to the extent it suggests otherwise.

Solem is Inapplicable

{29} Defendant, citing *Solem v. Bartlett,* argues that the State was required to prove that the exterior boundaries of the Taos Pueblo land grant have been diminished so

that the town of Taos is no longer within the land grant's exterior boundaries; and, that, absent such a showing, all land within the original boundaries of the land grant remains Indian country regardless of whether or not Indian title has been extinguished. We disagree.

{30} Diminishment analysis arises out of a completely different historical context: allotment and surplus lands acts.

> Many Indian reservations contain significant amounts of nonmember lands, due to the late-nineteenth-century policy of allotting reservation lands to individual tribal members. Allotments were subject to an initial 25-year restriction on alienation, after which an allottee could receive a patent-in-fee to the land. Although the general restriction on alienation was later extended indefinitely, many allottees nonetheless received patents-in-fee to their allotments, which terminated the trust responsibilities of the United States and allowed alienation of the allotted parcels. Many of the patented allotments were eventually sold to nonmembers. Such allotments generally remain part of the reservation.
>
> Once a reservation was fully allotted, Congress usually enacted legislation opening the remaining or "surplus" reservation lands to nonmember settlement. The method used to open reservation lands to settlement varied widely. . . . Whatever the method, the purpose of the surplus land acts was to return the lands to the public domain and thereby allow nonmember settlement under homesteading and other land disposal laws. While all the acts accomplished this, not all removed the lands from the reservation.

American Indian Law Deskbook 54 (Joseph P. Mazurek, et al., eds. 1998).

> Diminishment analysis is concerned with determining whether Congress intended a surplus land act to remove reservation lands opened to non-Indian settlement from the reservation: Whether Congress, in opening surplus lands to nonmember settlement, freed those lands from their reservation status is a question of congressional intent. Intent to remove reservation status is rarely found on the face of the involved statute since Congress, during the era of the surplus land acts, anticipated that the reservation system would shortly cease to exist. The process of allotting lands to tribal members and selling surplus lands to nonmembers was viewed as the "first step" toward Congress's ultimate aim of abolishing all Indian reservations, and Congress "failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." Since subsequent steps to abolish all reservations were never taken, the question becomes whether the surplus land acts, as the initial step in the process, were sufficient to complete the process in a single step instead of the expected series of steps. Courts have been unwilling to extrapolate from the overriding goal of abolishment a general congressional purpose of diminishing reservations with the passage of every surplus land act. Instead, courts examine each individual act to determine whether Congress intended the language of the specific act to diminish the reservation in question. Congressional intent is determined by examining the face of the act, its legislative history, events surrounding the act's passage, and subsequent treatment of the opened lands.

Id. at 56, 104 S.Ct. 1161. As Amicus Taos Pueblo concedes, "Congress never enacted a surplus lands act or otherwise opened Pueblo grant lands for non-Indian settlement."

{31} There is an additional historical ground for treating reservations and Pueblo land grants differently. In *Solem* the Supreme Court observed that

> only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

465 U.S. at 470, 104 S.Ct. 1161. *Solem* relied upon *United States v. Celestine,* 215 U.S. 278, 30 S.Ct. 93, 54 L.Ed. 195 (1909), as support for the above proposition. *Solem,* 465 U.S. at 470, 104 S.Ct. 1161. In *Celestine,* the United States Supreme Court observed that

> [I]t was decided, in *Bates v. Clark,* 95 U.S. 204, 209, 24 L.Ed. 471, that all the country described . . . as "Indian country" remains such "so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress." . . . But the word "reservation" has a different meaning, for while the body of land described in the section quoted as "Indian country" was a reservation, yet a reservation is not necessarily "Indian country." *The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for*

> *which Congress has authority to provide, and, when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.*

215 U.S. at 285, 30 S.Ct. 93 (emphasis added).

{32} The history of New Mexico Pueblos shows that Pueblo land grants are not "reservations" within the meaning of federal land law. Congress did not reserve the Pueblo lands out of lands ceded by the Pueblo Indians to the United States or out of public lands owned by the United States. *United States v. Pueblo of San Ildefonso,* 206 Ct.Cl. 649, 513 F.2d 1383, 1388 (1975). Rather, Congress merely confirmed the pre-existing claims of the Pueblos, authorizing the issuance of patents "as in ordinary cases to private individuals." Ch. 5, 11 Stat. 374 (1858). Pueblo land grants are no more federal reservations than are other private grants confirmed by the United States as required by international law and the treaty of Guadalupe Hildago. *See* 19 Pub. Lands Dec. 326, 327 (1894) [1894 WL 929 (D.O.I.)] (observing that patent to Cochiti Pueblo is "of the form adopted by the government with reference to all Spanish and Mexican land grants"); *Pueblo of San Ildefonso,* 513 F.2d at 1388.

{33} Defendant's reliance on *Solem* is misplaced. A test designed to determine Congress's intent in enacting a surplus lands act has no historical connection to Pueblo land grants.

CONCLUSION

{34} We reverse the trial court and vacate the order of dismissal. This matter is remanded for further prosecution of the charge against Defendant.

{35} **IT IS SO ORDERED.**

I CONCUR: LYNN PICKARD, Judge.

JONATHAN B. SUTIN, Judge (dissenting).

SUTIN, Judge (dissenting).

{36} I respectfully dissent. I do not accept the major rationales underlying the majority opinion's result. I think the case should be remanded for further proceedings.

{37} I do not accept as a justifiable basis for the result cases decided from *Clairmont* back and cases relying on *Clairmont* or *Bates*. *See Clairmont v. United States,* 225 U.S. 551, 32 S.Ct. 787, 56 L.Ed. 1201 (1912); *Bates v. Clark,* 95 U.S. 204, 24 L.Ed. 471 (1877). Those cases were decided in contexts and times too far removed to be of assistance in deciding the present case. I am not persuaded by the rationales of reliance by cases on a repealed definition under the 1834 act or of adoption by courts or Congress of a rule stemming for these early cases linking status as Indian country to non-extinguishment of Indian title.

{38} I prefer to begin with the 1910 Enabling Act (the Enabling Act) for New Mexico statehood and *Sandoval*. *See United States v. Sandoval,* 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913); New Mexico Enabling Act, ch. 310, 36 Stat. 557 (1910). The Pueblo Lands Act of 1924 (the PLA), of course is important. *See* Pueblo Lands Act, ch. 331, 43 Stat. 636 (1924). Then, "[i]n the 1930's the federal Indian

policy had shifted back toward the preservation of Indian communities generally" leading to the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984. *United States v. John,* 437 U.S. 634, 645, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978). Of course, *Venetie* must be addressed. *Alaska v. Native Vill. of Venetie Tribal Gov't,* 522 U.S. 520, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998).

{39} The 1910 Enabling Act, the applicability of which has not been argued on appeal, recognized federal dominance and governance over lands then held or occupied by Pueblo Indians. Those lands were considered Indian country. Then came the PLA in 1924. The purpose of the PLA was to remedy the complex and confused land title issues that existed due to the history of non-Indian settlement and ineffectual federal protection of the grant lands. It was not enacted for the purpose of affecting the jurisdictional status of the parcels, the Pueblo communal title to which was extinguished under the PLA. Nothing in the PLA suggests extinguishment of law enforcement jurisdiction, complete alienation of any geographically defined and contiguous portion of Pueblo land grants, or modification of land grant boundaries. Pursuant to the PLA, Taos Pueblo's communal title to the land in question and to other parcels of land was extinguished. As to those parcels, title was quieted in non-Indians; as to the remainder, title was confirmed and preserved in the Pueblo.

{40} *Venetie* sets out what it takes to establish a dependent Indian community. The definition is based on the Court's readings of *Sandoval, United States v. Pelican,* 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914), and *United States v. McGowan,* 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938). Although no case appears to analyze the issue, and although I am not entirely sure how a land

grant set aside for the Pueblo occupancy that is subject to federal superintendence encompasses a dependent Indian community but one parcel within the grant's exterior boundaries under non-Indian ownership due to the PLA is not a dependent Indian community, it does appear that federal cases have applied the dependent Indian community definition to individual parcels.

Nonetheless, *Venetie* did not involve Pueblo land grants or the PLA. It did not involve individual parcels situated within a land grant or even within a reservation. It involved revocation of an entire reservation. In addition, the express purpose of that revocation was "to end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy," and also to settle land claims "without creating a reservation system or lengthy wardship or trusteeship." 522 U.S. at 523-24, 118 S.Ct. 948 (internal quotation marks, emphasis, and citation omitted). *Venetie* is very different.

{42} It appears to me that interpretation of 18 U.S.C. § 1151(a) and (b), and future refinement of *Venetie,* in regard to jurisdiction to enforce criminal law, are works in progress, at least insofar as federal courts are concerned. On the federal level, *HRI, Inc. v. Environmental Protection Agency,* 198 F.3d 1224 (10th Cir. 2000), indicates, and I suggest *State v. Ortiz,* 105 N.M. 308, 731 P.2d 1352 (Ct.App.1986), on the state level, shows, that there is room for interpretation of congressional intent favoring a blending of the "reservation" and "dependent Indian community" concepts and the statutory subsections, at least insofar as major crimes are concerned, notwithstanding the rejection by *State v. Frank,* 2002-NMSC-026, 132 N.M. 544, 52 P.3d 404, of the Tenth Circuit's community of interest doctrine. *See also Blatchford v. Gonzales,* 100

N.M. 333, 335, 670 P.2d 944, 946 (1983) ("[I]t is apparent that Indian reservations and dependent Indian communities are not two distinct definitions of place, but definitions which largely overlap."). We have determined that "the *Sandoval* Court identified the pueblo in question as a distinctive Indian community in order to conclude that Congress had jurisdiction to legislate with respect to the lands then held or occupied by Pueblo members." *Ortiz,* 105 N.M. at 311, 731 P.2d at 1355. As far as I can tell, by its identification of dependent Indian community for the particular purposes stated, *Sandoval* did not intend the terminology to run a course through statute and case law that would ultimately separate reservations from dependent Indian communities for federal government dominance and superintendence and enforcement of major crimes by Indians against Indians. I am not prepared to hang my hat on *Venetie* to arrive at an extinguishment of federal jurisdiction to prosecute major crimes.

{43} I do not place much stock in the Santo Domingo Pueblo Claims Settlement Act of 2000, 25 U.S.C. §§ 1777 to 1777e (2000) (SDPCSA), which ratified and provided for the enforcement of an agreement between the United States and Santo Domingo Pueblo. S.Rep. No. 106-506 at 1 (2000). The agreement and the statute embody specific land claims settlements and whisk away the land title clouds that existed and were being litigated in aged lawsuits. The agreement "was negotiated in consultation with the State of New Mexico, other pueblos, local governments and private landowners, to settle the Pueblo's land claims and provide for settlement of decades-old lawsuits involving title to more than 80,000 acres of public, private, and Indian land." *Id.* One lawsuit, involving tens of thousands of acres of land that was subject to

overlapping Spanish land grants, resulted from a decision of the Pueblo Lands Board under the PLA. *Id.* at 2-3, 10-11.

{44} I do not read *Clairmont* and *Bates*, nor do I find any rule of linkage stemming from those cases or developed independently later on, as driving the placement of the jurisdictional provision in, or as codified by, the SDPCSA. No such existing case or case law is set out in Senate Report 106-506 or in the SDPCSA. One can infer from § 1777d(b) that in the give-and-take of settlement, the Santo Domingo Pueblo gave up a claimed right to jurisdiction as to the overlap area, and that the United States, unconcerned, agreed in order to get forty years of litigation concluded once and for all. Senate Report 106-506 reports that the jurisdiction matter was inserted "[i]n order to avoid jurisdictional confusion." S.Rep. No. 106-506 at 12-13. I think it is a mistake to generally apply § 1777d(b) as a statement of Congress's intent that all land within New Mexico Pueblos' exterior boundaries that is held in non-Indian title due to PLA extinguishment is no longer Indian country within the meaning of § 1151.

Finally, apropos to our view of legal history from the time of the PLA, Justice Brennan's dissent in *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana,* 472 U.S. 237, 105 S.Ct. 2587, 86 L.Ed.2d 168 (1985), is noteworthy:

> [T]he District Court for the District of New Mexico and the Court of Appeals for the Tenth Circuit . . . over the last 60 years have consistently held that Pueblo lands are *fully* governed by the Nonintercourse Act [see discussion of this Act, *Mountain States,* 472 U.S. at 241-45, 105 S.Ct. 2587] and that such lands are inalienable without

> explicit congressional authorization. . . . The decisions below were merely the most recent applications of this settled law. And this settled law not only did not conflict with decisions of this Court, but followed directly from them.

Id. at 280-81, 105 S.Ct. 2587 (footnotes omitted) (Brennan, J., dissenting).

{46} Nothing express exists to date from Congress from which a court can find a congressional intent to extinguish federal major crimes jurisdiction (which, at the same time, would necessarily entail extinguishment of Pueblo criminal jurisdiction), or to encroach on Pueblo sovereignty. Therefore, it seems to me the burden ought to be on the State to prove extinguishment of federal jurisdiction to prosecute major crimes committed on the land in question by substantial and compelling evidence of a congressional intent to remove the land from Indian country, having considered the consequences that flow from that removal.

{47} The *Venetie* test appears to identify land (as opposed to land and community) as dependent Indian community only if it passes the two-part test. 522 U.S. at 526, 118 S.Ct. 948. However, when the State asserts jurisdiction over a non-Indian owned parcel within the exterior boundaries of a Pueblo land grant, I think it appropriate to require the State to prove the negatives of both "set aside for occupancy" and "federal superintendence." This proof burden employs a presumption favoring Pueblo sovereignty. It rejects a presumption that extinguishment under the PLA of Pueblo communal title automatically amounted to an extinguishment of federal superintendence and of the parcel's status as Indian country for major crimes jurisdiction. *Cf. Mattz v. Arnett,*

412 U.S. 481, 505, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973) ("A congressional determination to terminate [a reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."); *Seymour v. Superintendent of Wash. State Penitentiary,* 368 U.S. 351, 358, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962) ("[T]he State can point to no language in § 1151's definition of Indian country which lends the slightest support to the idea that by creating a townsite within an Indian reservation the Federal Government lessens the scope of its responsibility for the Indians living on that reservation."). It at least might blow some life into the notions of "people," "culture," and "community," and their continuity and survival, notions not unreasonably to be considered along with the land as a focus of superintendence. The underlying issues, after all, involve people and culture, and not just land ownership. The Pueblo's concern about loss of sovereignty through slippery-slope court decisions that eliminate the Pueblo's authority over its members, and the State's concern that crimes by Pueblo Indians will not be adequately dealt with outside the State criminal justice system.

{48} The issues here involve practical, legal, and sovereignty considerations. As a practical matter, I do not as yet see a compelling reason why major crimes committed by Taos Pueblo Indians against Taos Pueblo Indians on the land in question cannot be prosecuted by the United States. (I can see a practical reason why the United States attorney may prefer not to have to deal with these crimes if the State will step in.) As a sovereignty matter, it is easy to understand the Pueblo's deep cultural and historical concerns about the loss of federal and Pueblo jurisdiction, particularly when the land in question was a part of the

original land grant, remains situated within the exterior boundaries of the land grant, and is land the federal government removed from Pueblo communal title under the PLA. As a legal matter, as I discuss earlier in this opinion, I am not prepared to read into the PLA an intent that was not expressed and probably not present, to apply *Venetie* by rote, to use the SDPCSA as a statement of congressional intent, or to reject the notion that the United States Supreme Court might refine *Venetie* or distinguish it in the context of Pueblo land grants and PLA parcels.

{49} My instincts tell me that this case should be remanded to the district court for further proceedings. Amicus were not involved in the district court proceedings. Section 1151(b) was not argued below. Defendant argued that § 1151(a) applied; the State argued that § 1151(c) applied. *Venetie* was hardly mentioned below and was never argued as instructive or controlling authority. Nor was *Venetie* mentioned in the district court's decision letter.

{50} In addition, the district court proceedings are noteworthy. Defendant was indicted on June 19, 2001. The New Mexico public defender entered an appearance for Defendant on July 3, 2001. On August 13, 2001, Defendant moved to dismiss for lack of subject matter jurisdiction. Defendant requested an evidentiary hearing on the motion on August 13 and again on October 23, 2001. The hearing was held on November 5 and November 28, 2001. On November 21, 2001, Defendant asked for a continuance of a November 27, 2001, trial setting to develop facts related to new issues the State was raising, namely the extinguishment of Taos Pueblo rights in 1924 and that the land in question was no longer Indian country. Defendant

needed time to "perfect the issue of subject matter jurisdiction," because the State raised "a new evidentiary issue," requiring time "to perfect the factual basis for his appeal on the issue of subject matter jurisdiction." Nevertheless, the hearing occurred on November 28, 2001. Defendant offered to plead guilty, conditioned on his right to appeal on the issue of subject matter jurisdiction. The court then heard the jurisdiction issue. *Venetie* was very briefly mentioned by defense counsel. In the hearing, the court acknowledged that "it's been a long while since I really dealt with what are termed 'Indian law issues.' . . . It's been too many years." Nothing was mentioned in the hearing regarding Defendant's motion for continuance, presumably because Defendant offered to enter a conditional plea. The court suggested that Defendant enter his plea, and, although the court took the jurisdiction issue under advisement, the very next day, on November 29, 2001, the court issued its letter decision, stating that the indictment must be dismissed for lack of jurisdiction.

{51} The foregoing procedural recitation indicates that it was likely that neither Defendant nor the district court thought it necessary to continue the case to allow further factual development by Defendant. Considering the district court's very quick decision, the court may not have been concerned about any lack of factual development before accepting Defendant's plea. The court probably felt on November 28 that it was going to hold in Defendant's favor based on the § 1151(a) and (c) arguments, on cases involving reservation diminishment and surplus lands, and on *Ortiz*. The problem with what occurred is that an appellate court might not affirm the district court's dismissal, and Defendant could lose without having had the opportunity to make a critical factual

record. That is what has now occurred. Whether this was Defendant's mistake, or the court's, is of little consequence here. This case is too significant for such a technical inquiry.

{52} Further, on appeal, *Venetie* was not mentioned in the State's brief in chief and its mention in Defendant's answer brief is of no consequence. The State's brief in chief and Defendant's answer brief are of little assistance. Obviously, the evidence presented in the district court was not honed to the real issue, namely, dependent Indian community under § 1151(b). Amicus stray some from the issues as they were tried below, but they do not hit the real issues on the head. The State does a complete about-face in its reply briefs, not only raising a critical theory and arguments not raised in its brief in chief, but also arguing as its primary and major theory a point that is inconsistent with the major point it raised in its brief in chief. We normally do not consider arguments raised for the first time in a reply brief. *State v. Castillo-Sanchez,* 1999-NMCA-085, ¶ 20, 127 N.M. 540, 984 P.2d 787. Neither Defendant nor any Amicus attempted an additional brief on the State's new point. There are solid indications that the factual record is not as complete as it ought to be. In its reply brief to Defendant's answer brief, the State sees the defects and proposes the alternative remedy of remand.

{53} I am not interested in deciding a case as important as this on appeal when it was tried solely on inapplicable statutes and issues and for the most part on questionable case law, and when it seems obvious that further evidence material to the applicable statutes, the critical issues, and the applicable case law, would assist the district court in arriving at findings of fact, conclusions

of law, and a judgment on the right issue, and would also assist the appellate courts that review the proceedings in the district court. *See United States v. Martine,* 442 F.2d 1022, 1023 (10th Cir. 1971) (discussing significance of evidence as to, among other things, "the relationship of the inhabitants of the area to Indian Tribes and to the federal government, and the established practice of government agencies toward the area" when determining whether an area is a dependent Indian community). As a general rule, we do not review matters not presented below. *Campos Enters. v. Edwin K. Williams & Co.,* 1998-NMCA-131, ¶ 12, 125 N.M. 691, 964 P.2d 855; *cf. Berlangieri v. Running Elk Corp.,* 2002-NMCA-060, ¶ 37, 132 N.M. 332, 48 P.3d 70 (Sutin, J., dissenting) (expressing disfavor with the majority's decision on an issue neither tried below nor placed before this Court by the parties), *aff'd* 2003-NMSC-024, 134 N.M. 341, 76 P.3d 1098 (affirming, but not on the issue as decided by the majority).

{54} This matter of first impression in our Court is an important one, in need of resolution. As I understand it, the United States District Court for the District of New Mexico has issued an unpublished order that upholds State criminal jurisdiction on land that is in the City of Espanola and not Indian country although it is within the exterior boundaries of the Santa Clara Pueblo. Perhaps ominous in regard to Pueblo interests, the United States has not intervened in, or requested to supply an amicus brief, in the present case. Although it may be that Defendant will ultimately lose and the Pueblo's interests will be adversely affected unless they can develop facts that will persuade the district court to stay with dismissal and persuade the majority in this Court to affirm, this Court, our Supreme Court, and the United States Supreme Court

(if the case were to arrive at its doorstep) nevertheless deserve a more fully developed evidentiary record and more fully developed legal positions and arguments, on the practical, legal, and sovereignty issues. The public defender appellate division of the State of New Mexico should not stand alone in the trial on jurisdiction. Interested parties such as the two Pueblos that filed Amicus briefs should take active roles in the trial of the issues on the merits. The United States should be invited to participate and should participate. The issues go far beyond the individual Defendant in this case. I realize that the case can be decided on the present record, but I do not think it judicious or prudent to do so.

{55} One lingering and troublesome question that seems to avoid the fray is why, as to federal major crimes jurisdiction, non-Indian owned parcels in reservations should, as a practical, legal, or sovereignty matter, be treated differently than non-Indian owned parcels in land grants. I understand there are historical distinctions between reservations and land grants in regard to Tribal rights to transfer title to property. To the extent distinctions existed, what is the rational basis for bringing them forward into § 1151 as a basis to distinguish between reservations and dependent Indian communities? Does § 1151(b) signal anything but an attempt by Congress to acknowledge the United States Supreme Court's judicial recognition of dependent Indian communities together with Congress's own recognition of federal dominance and governance of those communities. I suggest that, if courts must judicially resolve this jurisdictional dispute, it may be time for the courts to refrain from attempting through misfigured pieces to put together a perfect puzzle. The legal backdrop is quaggy and unstable. What exists is a

hodgepodge of cases involving a patchwork of statutes, and a mishmash of analyses, stated purposes, arguments, and results, providing, in my view, no common direction for the right result in this case. I am unable to find a congressional purpose that leads me to a definitive, much less right, result. The solution in this case needs a political, not a judicial solution.

{56} It is "Congress, in pursuance of the long-established policy of the government, [that] has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage." *Sandoval,* 231 U.S. at 46, 34 S.Ct. 1 (internal quotation marks and citation omitted). This early proclamation merits repeating today, not so much for the protective and paternalistic aspects needed at the time of New Mexico statehood, but as a guide for courts when considering issues that, in the last analysis, concern Pueblo sovereignty and require sensitive and important policy determinations.

{57} I recognize that the cry for political solution is of little consequence when the issues are dropped in a court's lap, particularly in view of Congress's continued abstinence. Thus, in the vacuum of congressional interest and action, if a policy determination must be made by an appellate court, let us do so on a better record, with fuller analyses and argument. To the extent a judicial solution is required because the matter is here, more than is presently before this Court is required to assure, as best we can, the right result. While the issues are in this Court, they should carry with them the fullest, most effective possible presentation of relevant evidence, of applicable

case law, [illegible]d of the practical and sovereignty consequences of [illegible] court decision.

{58} It is obvious that, in order to decide a case such as this, in their search for congressional intent courts will naturally hunt for relevant statutory language, legislative history, and generally-held contemporaneous understanding of its effect. In my view, this is, and will continue to be, a largely unsuccessful hunt in the present case. In such a circumstance, a court is compelled to turn to historical federal government, Pueblo, and State actions in regard to relevant lands, to practical consequences, and to what is right for the competing sovereigns, precisely what Congress ought to be addressing.

{59} Cases involving reservations, allotments, and surplus lands and involving concepts relating to those circumstances, including the diminishment of reservation boundaries, seem to me to be useful only for phrases taken from them and patched into Pueblo land grant issues in order to reach a particular result. I question whether there exists any analogical benefit from that practice with respect to the issues at hand.

{60} I recognize that distancing cases relating to reservations, allotments, and surplus lands from cases relating to Pueblo land grants and the PLA may not fully square with the notion that, for the purposes of jurisdiction, reservations, and land grants perhaps ought to be treated similarly. Nevertheless, it appears to me that it might be sensible to read congressional intent to be that of similar treatment for jurisdiction purposes until Congress expressly states what the majority holds, or at least until the State can present substantial and compelling evidence of such congressional intent.

{61} If I were to pick and choose among reservation-related cases, as I indicated earlier I would comfortably reject cases pre-dating *Sandoval,* and it would seem reasonable to choose to apply to the present circumstances a view similar to that stated in *Solem,* namely, that "[w]hen both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem v. Bartlett,* 465 U.S. 463, 472, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984).

{62} Further, I understand that canons of statutory construction generally consist of either a "thrust" and a "parry" or of a "thrust" and a "counterthrust." *See* Karl N. Llewellyn, *The Common Law Tradition,* App. C (Little, Brown & Co.1976) (1960). In the present case, I prefer to stick with the "thrust," namely, that "statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit." *Chickasaw Nation v. United States,* 534 U.S. 84, 88, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001) (internal quotation marks and citation omitted). In her dissent in *Chickasaw,* Justice O'Connor refers to this rule as "the Indian canon," and she states that it "presumes congressional intent to assist its wards to overcome the disadvantages our country has placed upon them." *Id.* at 99, 122 S.Ct. 528. It carries "the presumption that Congress generally intends to benefit the Nations." *Id.; see also United States v. Thompson,* 941 F.2d 1074, 1077 (10th Cir. 1991) (referring to cases that "stand for the proposition that when congressional intent with respect to an Indian statute is unclear, courts will presume

that Congress intended to protect, rather than diminish, Indian rights").

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

No. D-0101-CR-2002-808

STATE OF NEW MEXICO,

Plaintiff,

vs.

MATTHEW GUTIERREZ,

Defendant.

DECISION

(Endorsed Feb. 18, 2004)

The Court hereby makes the following decision in the above-styled and -numbered case:

Findings of Fact

1. The Defendant Matthew Gutierrez is an enrolled member of the Pueblo of Pojoaque, a federally-recognized Indian tribe. On August 25, 2002, he was arrested by the Pueblo of Pojoaque Tribal Police for an alleged crime that occurred within the exterior boundaries of the Pueblo of Pojoaque on private claim land.

2. The State of New Mexico asserted criminal jurisdiction over the case.

3. On January 27, 2003, the Defendant filed a motion to dismiss the State action on the grounds that the State lacks subject matter jurisdiction.

4. The Defendant's motion was heard on September 15, 2003.

5. The Pueblo of Pojoaque Tribal Court case in this matter remains pending. Stipulations on Subject Matter Jurisdiction were filed on July 29, 2003 and are adopted herein.

6. The land upon which the alleged crime occurred was the site of the original pueblo of Pojoaque.

7. The site of the alleged crime has been "Indian country" for hundreds of years and has been acknowledged as such by the federal government.

8. The alleged crime occurred at the residence of Ben Garcia.

9. The land upon which the alleged crime occurred is no longer owned by the Pueblo of Pojoaque.

10. Ben Garcia is the owner of the private claim land where the alleged crime took place.

11. "Private claim" land is land located within the exterior boundaries of the Pueblo of Pojoaque, but which is owned by someone with fee title to the land.

12. The land on which the alleged crime occurred was deeded to the Garcia family as a result of the 1924 Pueblo Lands Act.

13. The Pueblo Lands Board Map shows the location of private claims land within the exterior boundaries of the Pueblo of Pojoaque, which were determined to be valid private claims under the Pueblo Lands Act of 1924.

14. The alleged crime was not committed on land that is a designated Indian reservation.

15. Kevin Gover was qualified and admitted in this case as an expert witness in the area of federal Indian law and on federal policy and administration of Indian affairs.

16. Jacob Viarrial has been the Governor for the Pueblo of Pojoaque for 22 years.

17. George Rivera has been the Lieutenant Governor fo the Pueblo of Pojoaque since 1992.

18. Lt. Governor Rivera was qualified and admitted in this case as an expert witness in the customs, culture and laws of the Pueblo of Pojoaque and on the Pueblo's interaction with the federal government and with federal law.

19. John Garcia has been the Tribal Police Chief for the Pueblo of Pojoaque since 2001.

20. Stephanie Birdwell is the Regional Social Work Director for the Bureau of Indian Affairs.

21. Birdwell has provided services to Indian students attending Pojoaque High School.

22. Birdwell provided those services at the Pojoaque High School from 1996 through 2002.

23. The federal government has had the responsibility for the superintendence of all lands within the Pueblo of Pojoaque since the United States confirmed Spanish and Mexican grants in 1864.

24. The federal government, beginning in the earliest days of the existence of the United States has had a responsibility or "trust duty" to regulate Indian affairs.

25. For 150 years, the United States, primarily through the Bureau of Indian Affairs, has governed all aspects of tribal life.

26. Since 1975, the federal policy regarding superintendence over Native American tribes has been referred to as "self determination" or "self governance."

27. The federal self determination policy calls for the transfer of authority from the United States to the Tribes themselves, which is done primarily through contracts made between the United States and the Tribes, whereby the Tribes deliver services and exercise responsibilities in Indian Country.

28. The federal policy of self determination is set forth by federal statute that requires the Bureau of Indian Affairs, upon a tribe's request, to contract with the Tribe for the Tribe itself to deliver and administer most of the programs that had formerly been administered by the Bureau of Indian Affairs.

29. "Self determination contracts" or "638 contracts", refer to Public Law 93-638, the Indian Self Determination and education assistance Act.

30. The Bureau of Indian Affairs is the primary branch of the federal government that has the responsibility to provide law enforcement services in "Indian country".

31. Law enforcement 638 contracts are governed by federal law that delineates requirements for the Bureau of Indian Affairs law enforcement, which requirements are then passed on to the Tribes.

32. When the Bureau of Indian Affairs contracts with the Tribe to carry out any program, particularly law enforcement, the Tribe is assuming the responsibilities that the United States previously had.

33. Law enforcement 638 contracts contain provisions that require tribal officers to achieve a certain level of training and that require the Tribe to show the capacity to fairly and impartially administer law enforcement in "Indian country".

34. If a Tribe does not meet the terms of a 638 contract, the Bureau of Indian Affairs process could ultimately lead to "retro cession", which means the Bureau resumes control of the program.

35. The Pueblo of Pojoaque's 638 law enforcement contract provides:

> "The purpose of this contract is to insure professional, effective and efficient law enforcement services are provided for the Pueblo of Pojoaque utilizing accepted law enforcement techniques and practices. More specifically, to provide for the protection of lives and property for persons visiting or residing within the exteriors boundaries of the Pueblo of Pojoaque reservation."

36. The term "exterior boundaries" is a term of art in Indian law, which comes from two sources. First, 18 U.S.C. §1151(a) is the "Indian country" statue, which refers to land within the exterior boundaries of an Indian reservation as being "Indian country". Second, in the Pueblo Lands Act of 1924, references to "exterior boundaries" are the area within the exterior boundaries of the various Spanish and later Mexican grants to the Pueblos, which were confirmed by the United States.

37. The Pueblo of Pojoaque's 638 law enforcement contract states:

> "The Contractor [Pueblo of Pojoaque] shall provide law enforcement services to all residents and visitors to Pueblo fo Pojoaque reservation in accordance with the provisions of applicable federal and tribal laws."

38. The Bureau of Indian Affairs' law enforcement programs for the New Mexico pueblos have always provided services throughout the various pueblos regardless of the particular land title or the title status of the land.

39. The tribal police are the first responders to non-Indian property within the Pueblo.

40. The Pueblo of Pojoaque 638 law enforcement contract provides:

> "The uniformed patrol unit is responsible for traffic enforcement and crash investigation on US 84-285, County Roads 502, 503 and all other roadways within the exterior boundaries of the Pueblo Pojoaque."

The provisions further states:

> "The uniformed patrol unit also responds to calls for service and assists other law enforcement agencies requiring assistance within the exterior boundaries of the Pueblo of Pojoaque and in neighboring communities."

41. The Pueblo of Pojoaque 638 law enforcement contract with the Bureau of Indian Affairs provides that the Pueblo's Tribal Law and Order Code is incorporated by reference into the 638 contract.

42. The Pueblo of Pojoaque Tribal Law and Order Code was authorized by the Pueblo of Pojoaque Tribal Council and the Bureau of Indian Affairs.

43. The Pueblo of Pojoaque Tribal Council is the governing body of the Pueblo of Pojoaque.

44. The Pueblo of Pojoaque Tribal Council passes the laws contained in the Pueblo of Pojoaque Law and Order Code.

45. The laws of the Pueblo of Pojoaque apply within the boundaries of the Pueblo of Pojoaque.

46. The Pueblo of Pojoaque Law and Order Code provides:

> "The Pojoaque Pueblo Court shall have jurisdiction over all offenses enumerated in the Law and Order Code when committed by any Indian within the exterior boundaries of the Pojoaque Pueblo."

47. The Pueblo of Pojoaque Law and Order Code grants criminal jurisdiction to the Pueblo of Pojoaque Tribal Court over offenses committed by all Indians, whether or not they are tribal members, when they are "within the exterior boundaries of the Pueblo of Pojoaque."

48. Tribal laws reflect and promote the Indian culture.

49. Federal funds are needed to address the law enforcement needs of the Pueblo of Pojoaque.

50. Federal and Pueblo of Pojoaque money for law enforcement is used to benefit non-Indians and Indians.

51. The Pueblo of Pojoaque supplemented law enforcement funds because the federal funds were insufficient to address the needs on both Pueblo-owned and non-Pueblo-owned lands within the Pueblo of Pojoaque.

52. Approximately 75 percent of the Pueblo of Pojoaque Tribal Police Department's time is spent on criminal actions concerning non-Indians.

53. The Pueblo of Pojoaque and the federal government pay the salaries of the Pueblo of Pojoaque Tribal Police Department while it is working on non-Indian cases.

54. There are four Indian Pueblos in northern Santa Fe County: Tesuque, Pojoaque, Nambe and San Ildefonso.

55. The Pueblo of Pojoaque Tribal Police respond to all calls within the Pueblo of Pojoaque's exterior boundaries regardless of whether the land is private claim or Pueblo-owned land.

56. The Pueblo of Pojoaque Tribal Police responded to a call regarding Matthew Gutierrez in August 2002.

57. On a typical day, there is only one Santa Fe County Sheriff's Deputy assigned for law enforcement for the entire county north of Santa Fe city.

58. The Pueblo of Pojoaque Tribal Police officers must be commissioned by the County in order for the officers to arrest non-Indians within the exterior boundaries of the Pueblo of Pojoaque.

59. When prosecuting non-Indians, the Pueblo of Pojoaque Tribal Police officers work with the First Judicial District Attorney's office.

60. The Pojoaque High School and the majority of the land upon which the High School are not owned by the Pueblo of Pojoaque.

61. Most Indian students at Pojoaque High School reside in the Pueblo of Pojoaque and other tribal communities.

62. Birdwell's responsibilities included attending manifestation hearing for special education services, attending meetings between teachers and school administrators regarding an Indian child's behavior at school, and consulting to the school regarding the referral process for when there was a suspicion that an Indian child was being abused or neglected.

63. The referrals Birdwell received on Indian children included behavior problems, aggression, and educational neglect. Those referrals often ended up in Tribal Court.

64. The cases ended up in Tribal Court when the Indian child's family did not respond to outreach and intervention.

65. The Tribal Court would hear the case within 24 to 48 hours.

66. The Tribal Court would hold a hearing and adjudicate the child as a child in need of supervision, or a juvenile offender, and the family would be required to work with the BIA social services program and other Tribal programs to rectify the problem.

67. The Tribal Court could make the Indian child a ward of the court. The Tribal Court could also bring in the Indian child's family members, order culturally sensitive

outreach that was designed to get the child to see the impact of his or her behavior on the community.

68. Tribal Courts include cultural components within the Tribal Court.

69. BIA social services would not be provided to an Indian child attending Santa Fe High School.

70. BIA provides social services to Indian children attending Pojoaque High School because Pojoaque High school is in "Indian country".

71. Based on Birdwell's experience and the practice of the Bureau of Indian Affairs, the federal government, not the State government, superintends the social work programs for Indians within the Pueblo of Pojoaque's exterior boundaries.

72. The Pueblo of Pojoaque graveyard is on private claim land.

73. Pueblo of Pojoaque's ancestors are buried in the graveyard.

74. The Pueblo of Pojoaque has laws prohibiting sketching and taking pictures of the Kiva Viarrial testimony.

75. It is a violation of the sacredness of the Pueblo of Pojoaque's dances for someone to take pictures of the dances while standing in the graveyard. The Pueblo of Pojoaque would not have jurisdiction over their ancestor's graves and would not have jurisdiction to stop trespassers, sketching or taking of photographs from the graveyard if the graveyard is not "Indian country".

76. Congress addressed this situation in the Pueblo Lands Act of 1924 by establishing a method by which both Indian and non-Indian title could be established and proven before the Pueblo Lands Board.

77. The term "status of the land" refers to the land's status as "Indian country".

78. Land title is not the same as the status of land as "Indian country". There are many circumstances where land owned by non-Indians or non-members of a particular tribe are still within "Indian country".

79. There are acres of land that are owned by non-Indians that are nevertheless "Indian country".

80. When title to land was transferred to non-Indians under claims of adverse possession under the Pueblo Lands Act of 1924, that did not change the land's status as "Indian country".

81. The United States has plenary authority over Indian land.

82. The Bureau of Indian Affairs' policy is that, until it is established by law that a portion of a reservation has literally been removed form the reservation by an Act of Congress, then that property remains "Indian country" regardless of who owns it.

83. Congress is the branch of the federal government that extinguished "Indian country" in Alaska.

84. Congress is the branch of federal government that extinguished "Indian country" as far as criminal supervision in California.

85. Congress has never extinguished "Indian country" within the Pueblo of Pojoaque.

86. There has been no law that removes a portion of the Pueblo of Pojoaque from the Pueblo.

87. The 1924 Pueblo Lands Act contained no language disestablishing the original exterior boundaries of the Pueblo for purposes of criminal jurisdiction over Indians.

88. The federal government today superintends any conduct by an Indian on all land within the reservation, including non-Indian or private claim land.

89. The federal government has historically superintended all land, whether pueblo-owned or private claim, that is located within the exterior boundaries of the Pueblo of Pojoaque.

90. The federal and tribal governments are the dominant law enforcement agencies for all land, whether pueblo-owned or private claim that is located within the exterior boundaries of the Pueblo of Pojoaque.

91. The entirety of the Pueblo of Pojoaque is "Indian country".

Conclusions of Law

1. "Indian country" within the Pueblo of Pojoaque has not been diminished.

2. Only Congress may diminish the "Indian country" status of land.

3. Any ambiguity regarding diminishment is resolved in favor of the Tribe.

4. Land within the Pueblo of Pojoaque has been set-aside by the federal government as "Indian country".

5. In 1913, the U.S. Supreme Court recognized the Pueblos of New Mexico as "dependent Indian communities" deserving of federal protection.

6. All land with the Pueblo of Pojoaque is under federal superintendence.

7. The Ortiz Court held that all land within the exterior boundaries of the Pueblo of San Juan, regardless of how that land is titled, remained "Indian country".

8. New Mexico has not accepted, nor have the Pueblos granted, criminal jurisdiction over Indians within the Pueblos.

9. Any attempt to extend State criminal jurisdiction over Indians within the Pueblos would interfere with the federal policy of self-determination and the Pueblos' sovereign right to govern themselves.

10. All land within the Pueblo of Pojoaque, including private claim land, is "Indian country".

11. The State does not have criminal jurisdiction over Indians within the exterior boundaries of the Pueblo of Pojoaque.

12. This matter is certified for appeal and possible consolidation with State of New Mexico v. Del Romero, Docket No. 22,836, now pending certiorari before the New Mexico Supreme Court.

13. All requested Findings of Fact and Conclusions of Law inconsistent with the Court's decision are **DENIED**.

/s/ Michael E. Vigil
MICHAEL E. VIGIL,
District Judge

Notice mailed on the date filed:

Lloyd Drager, Assistant District Attorney
Lisa Weisenfeld, Assistant District Attorney
Sarah C. Piltch, Assistant District Attorney
Douglas E. Couleur, Defense Attorney
Frank Demolli, Pueblo of Pojoaque, Special Appearance on behalf of Defendant

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

August 30, 2006

NO. 28,410

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

DEL E. ROMERO,

Defendant-Petitioner.

Consolidated with:

NO. 28,688

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

MATTHEW GUTIERREZ,

Defendant-Petitioner.

ORDER

WHEREAS, this matter came on for consideration by the Court upon motion for rehearing and responses thereto, and the Court having considered said pleadings and being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the motion for rehearing hereby is DENIED.

IT IS SO ORDERED.

WITNESS, Honorable Richard C. Bosson, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 30th day of August, 2006

(SEAL) /s/ Kathleen Jo Gibson
Kathleen Jo Gibson, Chief Clerk of the Supreme Court of the State of New Mexico

[SEAL]

STATE OF NEW MEXICO
EIGHTH JUDICIAL DISTRICT

CHAMBERS OF

PEGGY J. NELSON
DISTRICT JUDGE
DIVISION I

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November 29, 2001

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Re: State v. Del E. Romero
Taos County Cause No. 2001-108 CR

(Filed Nov. 29, 2001)

Dear Counsel,

Thank you for the opportunity to review this most interesting question of whether or not the State of New Mexico has jurisdiction over the charge filed against Del E. Romero. What makes this question so interesting is that, in spite of a developing body of case law involving nearby towns and Pueblos, this issues has apparently not been raised in any case involving the Town of Taos and the Pueblo of Taos Grant.

The parties stipulated as follows: Del Romero is an enrolled member of Taos Pueblo; Darrell Mondragon, the alleged victim, is an enrolled member of Taos Pueblo; the incident occurred at the Pueblo Alegre Mall, within the Town of Taos; and, Lt. Eddie Lucero of the Town of Taos Police Department responded to the incident that lead to the filing of Aggravated Battery charges because he believed the town had jurisdiction over the offense.

Various maps were admitted into evidence. Some are without dates, some are not clear as to interpretation. What is clear, and the parties agree, is that the incident occurred on private property within the town limits, in an area which lies to the north of the southern boundary of the Taos Pueblo Grant. That is, the area of the incident falls within the original exterior boundaries of the Taos Pueblo Grant. If the site of the incident is within "Indian Country", jurisdiction lies with the Federal government, and not with the State.

18 U.S.C. 1151 defines "Indian Country:" as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

Only subsections (a) and (c) were argued. The defense argues that (a) applies, and that notwithstanding the private ownership (perhaps through the issuance of patents) of the

Mall, the Mall lies within "Indian Country". The State argues that (c) applies, and cites the Pueblo Indian Land Grants Act of 1924, ch. 331, 43 Stat. 636 for the proposition that the lands in question are allotments which have been extinguished. The State also submitted Exhibit #2, a plat map related to the survey and plat requirements of the Pueblo Indian Land Grants Act, which clearly shows that the title to the property in question was extinguished pursuant to the procedures set forth in the Act. The Act, by the way, also makes reference to patents being issued by the Secretary of the Interior after all procedural requirements were met by claimants within the exterior boundaries of the Pueblo. The Title Policy, Exhibit #3 makes reference to a patent from the United States to Randall of Gerken.

Lands within the exterior boundaries of the Pueblo of Taos Grant are not allotments. Allotments, generally, are lands not within a "continuous reservation" or within the exterior boundaries of a reservation, set aside for Indian use. They are "Indian County" if title has not been extinguished.

The 1924 Act, as submitted by the State makes reference to the purchase of certain lands for wood, forage and personal or tribal needs of Taos Pueblo. Those lands are to the east and north of the original grant, and are not implicated in this discussion. There is no evidence that the site of this incident is an allotment. It is clearly within the exterior boundaries of the Pueblo Grant. The question is: Does the extinguishment of title, issuance of patents to private non-Indian individuals, and private ownership, take the property out of "Indian Country"? I believe it does not.

State v. Ortiz 105 N.M. 308 (Ct.App. 1986) presents a factually similar case. There, the incident occurred within the corporate limits of Espanola, and within the exterior boundaries of San Juan Pueblo. There, the Court noted "The lands of the Pueblo, like those of other New Mexico pueblos, are held and occupied pursuant to a grant made by the Spanish government during the time when New Mexico was a Spanish possession. That grant subsequently was confirmed by the Mexican government after it declared independence from Spain, and then by Congress after the territorial cession made by the Treaty of Guadalupe Hidalgo. (Citations omitted) . . . The terms upon which New Mexico was admitted to the Union recognized the lands owned or occupied by Pueblo Indians as 'Indian Country.' The Pueblo Grants are equated to reservations for purposes of Section 1151. In *Ortiz,* "The particular facts of this case do not require a conclusion that the are in question has lost its status as "Indian Country" . . . Because there is no evidence of any relevant change in status, the controlling fact is that the offense occurred within the exterior boundaries of the Pueblo."

Other cases nation-wide have looked at the question of whether or not reservation boundaries were diminished or revised. Here are some synopses from those cases:

– In determining whether reservation boundaries were subsequently diminished by congressional enactments, Court is guided by underlying premise that congressional intent will control; mere fact that reservation has been opened to settlement does not necessarily mean that opened area has lot its reservation status; in all cases, face of Act in question, surrounding circumstances, and legislative history are to be examined with eye toward

determining what congressional intent was. *Rosebud Sioux Tribe v. Kneip* (1977) 430 U.S. 584.

– Federal court had jurisdiction over violations of 18 USC 1153 committed on fee patented land which was "Indian Country" . . . although Congressional Act had opened to settlement portion of reservation, since neither express language of act nor surrounding circumstances and legislative history indicated Congressional intent to affect disestablishment of reservation. *U.S. v. Dupris* (1979, CA8 SD), 612 F.2d 319, vacated on other grounds (1980) 446 U.S. 980.

– Unneeded reservation lands upon which patents are issued continued to be included within reservation since sale of surplus lands in allotment context, without express severance from reservation, does not terminate reservation status of land; Act of 1890 purporting to effect "reduction" of reservation in question by selling certain unused land did not evidence clear intent of Congress to terminate land from reservation, and land is Indian Country, subject to existing patents as defined in 18 USC 1151. *Russ v. Wilkins* (1976, ND Cal) 410 F.Supp. 579.

What is clear is that there needs to be clear Congressional intent in an Act to diminish or change reservation boundaries. In this case, there is not proof of such an Act or intent within an Act. Evidence does show the existence of a patent as to the land in question, and private ownership. As in *Ortiz, supra,* because there is no evidence of a change in status, "the controlling fact is that the offense occurred within the exterior boundaries of the Pueblo."

Under all of the circumstances of this case, the State does not have subject matter jurisdiction over this charge. The Grand Jury Indictment against Mr. Romero must be

dismissed without prejudice. The matter may be prosecuted by the U.S. Attorneys Office.

I ask Mr. Maestas to prepare an order reflecting this decision. Thank you.

Sincerely,

/s/ Peggy J. Nelson
Peggy J. Nelson

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Respondent,

vs. **No. 28,410**

DEL E. ROMERO,
Defendant-Petitioner.

CONSOLIDATED WITH:

STATE OF NEW MEXICO,
Plaintiff-Respondent,

vs. **No. 28,688**

MATTHEW GUTIERREZ,
Defendant-Petitioner.

STATE OF NEW MEXICO'S MOTION FOR REHEARING

(Filing Jun. 29, 2006)

The State of New Mexico, by Margaret McLean, Assistant Attorney General, hereby moves for rehearing. Rule 12-404 NMRA 2006. The Opinion was issued on June 14, 2006. This motion for rehearing is timely filed on June 29, 2006. Rule 12-404(A) NMRA 2006.

The State of New Mexico respectfully submits the following grounds in support of rehearing:

1. Rule 12-404(A) provides that a motion for rehearing "shall state briefly and with particularity, but without

argument, the points of law or fact which in the opinion of the movant the court has overlooked or misapprehended."

2. The Opinion overlooked or misapprehended that a state court is bound by federal law in interpreting the definition of Indian country for the exclusive determination of federal criminal jurisdiction set forth in 18 U.S.C. § 1151. The controlling federal law for interpreting 18 U.S.C. § 1151(b) includes *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998); *United States v. M.C.*, 311 F.Supp.2d 1281 (D.N.M. 2004); *United States v. Arrieta,* 436 F.3d 1246 (10th Cir.), *cert. denied,* ___U.S.___, 2006 WL 1221978 (June 5, 2006); and *United States v. Gutierrez*, United States District Court for the District of New Mexico, No. CR-00-M-376 H (unpublished opinion). *See* Richard W. Hughes, *Indian Law,* 18 N.M.L.Rev. 403, 403 n.3 (1988) (noting that the field of Indian law is "one of federal law, as to which state court decisions are not binding) and Rennard Strickland, *Felix S. Cohen's Handbook of Federal Indian Law* (Cohen, *Federal Indian Law*) (1982 ed.), at 1 (federal law controls).

3. The Opinion overlooked or misapprehended that New Mexico case law has consistently and correctly applied *Venetie* to both civil and criminal cases. *See State v. Dick,* 127 N.M. 382, 981 P.2d 796 (Ct. App. 1990); *State v. Frank,* 2002-NMSC-026, 132 N.M. 544, 52 P.3d 404, *rev'g, State v. Frank,* 2001-NMCA-026, 130 N.M. 306, 24 P.3d 338; *Tempest Recovery Services, Inc, v. Belone,* 2003-NMSC-019, 134 N.M. 133, 74 P.3d 67; and *State v. Quintana,* New Mexico Court of Appeals, No. 25,109 (issued June 15, 2006).

4. The Opinion overlooked or misapprehended that each of the New Mexico cases listed in paragraph 3 must

now be explicitly overruled based on the analysis and interpretation of 18 U.S.C. § 1151(b) and *Venetie.*

5. The Opinion overlooked or misapprehended that this Court's sole responsibility is to construe 18 U.S.C. § 1151(b) according to federal law. *New Mexico ex rel. Ortiz v. Reed,* 524 U.S. 151 (1998), *rev'g, Reed v. State ex rel. Ortiz,* 1997-NMSC-055, 124 N.M. 129, 947 P.2d 86.

6. The Opinion overlooked or misapprehended the federal standard of review for statutory construction for interpreting the three separate categories of Indian country in 18 U.S.C. § 1151. *United States v. La Bonte,* 520 U.S. 751, 757 (1997). *See generally* Richard W. Hughes, Indian Law, 18 N.M.L.Rev. 403, 461 (1988) and Paul W. Shagen, *Indian Country: The Dependent Indian Community Concept and Tribal/Tribal Member Immunity from State Taxation,* 27 N.M.L.Rev. 421, 444-445 and n.208 (1997).

7. The Opinion overlooked or misapprehended that an ambiguity exists in 18 U.S.C. § 1151 and the canon of Indian law construction to resolve the ambiguity was applicable. *See State v. Frank,* 2002-NMSC-026, ¶ 22 (interpreting *Venetie* as providing "clear guidelines") and Cohen, *Federal Indian Law,* at 28 (commenting that the interpretation of 18 U.S.C. § 1151 is "straightforward in most cases"). *See generally* Max Minzner, Case Note, *Construction Work: The Canons of Indian Law,* 107 Yale L.J. 863 (1997).

8. The Opinion overlooked or misapprehended that *State v. Romero,* 2004-NMCA-012, 135 N.M. 53, 84 P.3d 670, correctly made the historical, political, and legal distinctions between a reservation and a dependent Indian community provided in 18 U.S.C. § 1151(a) and 18 U.S.C.

§ 1151(b). *Oklahoma Tax Comm. v. Sac and Fox Nation,* 508 U.S. 114 (1993).

9. The Opinion overlooked or misapprehended that the terms and definitions of "original exterior boundaries", "diminishment", and "extinguishment" are consistently used in federal Indian law statutes, cases, treatises, and texts. Each term has a specific definition for interpreting 18 U.S.C. § 1151 and the three different categories of Indian country. The terms are applicable to New Mexico Pueblo lands and the determination of federal criminal jurisdiction.

10. The Opinion overlooked or misapprehended the Pueblo Lands Act of 1924, Section 13, and the Santo Domingo Pueblo Claims Settlement Act of 2000, 25 U.S.C. §§ 1177-1777e (2000), as direct evidence of Congressional intent concerning Pueblo lands in New Mexico and the impact of extinguishment of title to lands within the original exterior boundaries of a Pueblo land grant.

11. The Opinion overlooked or misapprehended that reservations generally represent a relocation from aboriginal lands and a reservation of federal public domain land for a specific Indian tribe. Unlike reservations, New Mexico Pueblos retained aboriginal lands and are not the product of a federal policy of relocation and resettlement from aboriginal lands. Cohen, *Federal Indian Law,* at 38 and n.98.

12. The Opinion overlooked or misapprehended the decision in *United States v. Pueblo of Taos,* 33 Ind. Cl. Comm. 82 (1974), *aff'd*, 515 F.2d 1404 (Ct. Cl. 1975), affirming the extinguishment of 926 acres representing the Town of Taos.

13. The Opinion overlooked or misapprehended the legal requirement of a federal set aside and the factual findings necessary for dependent Indian community status. The extinguishment of Indian title by the Pueblo Land Act of 1924 and transfer of the title in fee simple to a non-Indian precludes any finding that the site of the crime was subject to a federal set aside for the use and enjoyment of an Indian community. The parking lot of the Pueblo Allegre Mall at 223 Paseo Del Sur, Taos, New Mexico, is not subject to the federal set aside mandated by 18 U.S.C. § 1151(b). *See Venetie,* 522 U.S. at 531 (federal set aide is essential to ensure that an Indian community occupies the land in question).

14. The Opinion overlooked or misapprehended the legal requirement of federal superintendence and the factual findings necessary to meet this standard. *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.,* 89 F.3d 908, 920 (1st Cir. 1996).

15. The Opinion overlooked or misapprehended that the specific parcel of land must be evaluated to determine a dependent Indian community. *See Venetie,* 522 U.S. at 530 n.5; *Nevada v. Hicks,* 533 U.S. 353, 391 (2001); *United States v. Arrieta,* 436 F.2d at 1247; and *State v. Frank,* 2001-NMCA-026, ¶ 38 (Bosson, J., dissenting).

16. The Opinion overlooked or misapprehended that title to the land is critical to determine whether or not the land is subject to a federal set aside. *See State v. Dick,* 1999-NMCA-062, ¶ 10, 127 N.M. 382, 981 P.2d 786, *cert. quashed,* 129 N.M. 208, 4 P.3d 36 (2000) (*Venetie* unequivocally shifted "the emphasis from the inhabitants and their day-to-day relationship with the government to a land-based inquiry").

17. The Opinion overlooked or misapprehended that *Venetie* is "limited to specific Alaskan facts." *Venetie* applies to any dependent Indian community within the United States as defined in 18 U.S.C. 1151(b). *Venetie* cannot be limited to Alaska but equally applies to all dependent Indian communities within the United States, including New Mexico.

18. The Opinion overlooked or misapprehended *State v. Frank,* 2002-NMSC-026. *State v. Frank* is not distinguishable and inapplicable simply because the case involved highway land owned by the federal government.

19. The Opinion overlooked or misapprehended the New Mexico Enabling Act and N.M. Const., art. XXI, § 2: ". . . and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States." This provision establishes Congress expressly linked federal dominance and governance over Indian lands to the non-extinguishment of Indian title.

20. The Opinion overlooked or misapprehended that *State v. Ortiz,* 105 N.M. 230, 731 P.2d 1352 (Ct. App. 1986) is contrary to *Venetie* and 18 U.S.C. § 1151(b).

21. The Opinion overlooked or misapprehended the entire chronology of Congressional actions impacting New Mexico Pueblo lands and the determination of dependent Indian community status by asserting "Congressional silence" concerning the jurisdictional status of lands within the original exterior boundaries of the Pueblo land grants.

22. The Opinion overlooked or misapprehended that *Hilderbrand v. Taylor,* 327 F.2d 205 (10th Cir. 1964), concerned an Indian reservation as defined in 18 U.S.C. § 1151(a) and not a dependent Indian community as defined in 18 U.S.C. § 1151(b).

23. The Opinion overlooked or misapprehended that Congress has the exclusive power and authority to define Indian country and the definitions contained in other federal statutes, exclusive of 18 U.S.C. § 1151(b), are not controlling for purposes of determining federal criminal jurisdiction. *Arizona Public Service Co. v. Environmental Protection Agency,* 211 F.3d 1280, 1293 (D.C. Cir. 2000), *cert. denied,* 532 U.S. 970 (2001).

24. The Opinion overlooked or misapprehended that a federal statute must not be construed so as to render any one part redundant or superfluous. *United States v. Alaska,* 521 U.S. 1, 31 (1997). *See Venetie,* 522 U.S. at 527 (a dependent Indian community refers to a "limited category of Indian lands that are neither reservations nor allotments and that satisfy two requirements.").

25. The Opinion overlooked or misapprehended State's Exhibit 3, an agreement between the Taos Pueblo and the Town of Taos on Right-of-Way for Certain Streets. This agreement would be unnecessary and irrelevant if the land within the original exterior boundaries was an Indian reservation, 18 U.S.C. § 1151(a), because reservations include all rights-of-way.

WHEREFORE the State of New Mexico respectfully requests this Court grant this motion for rehearing.

Respectfully submitted,

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on this 29th day of June, 2006.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. No. CR 00-M-375 LH

JOSE GUTIERREZ,

Defendant.

ORDER OF DISMISSAL

(Filed Dec. 1, 2000)

THIS MATTER came before the Court for hearing on November 30, 2000, on Defendant's Motion for Reconsideration by District Judge of Magistrate Judge's Denial of Defendant's Motion to Dismiss (Docket No. 20), filed August 10, 2000. The Court, having considered the pleadings submitted by the parties, the arguments of counsel, and otherwise being fully advised, and for the reasons stated on the record, finds that the motion is well taken and shall be **granted**. Accordingly, this case shall be **dismissed** for lack of jurisdiction.

As I stated on the record, the controlling case in this matter is *Alaska v. Native Village of Venetie Tribal Gov't*, which sets forth the federal set-aside and superintendency requirements for a finding of Indian Country status. 522 U.S. 520 (1998). While the land in question may at one time have been Indian Country, the Pueblo Lands Act of 1924 (43 Stat. 636) clearly and intentionally quieted title to the land in question against the Pueblo of Santa Clara. Consequently, the land in question no longer satisfies the federal set-aside requirement necessary for a finding of

"Indian Country" and this Court cannot exercise subject matter jurisdiction in this case.

IT IS, THEREFORE, ORDERED that Defendant's Motion for Reconsideration by District Judge of Magistrate Judges Denial of Defendant's Motion to Dismiss (Docket No. 20), filed August 10, 2000, is **granted**.

IT IS FURTHER ORDERED that this case is **dismissed**.

/s/ C. LeRoy Hansen
UNITED STATES
DISTRICT JUDGE

No. 06-765

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

STATE OF NEW MEXICO,

Petitioner,

v.

DEL E. ROMERO and MATTHEW GUTIERREZ,

Respondents.

On Petition For Writ Of Certiorari To The New Mexico Supreme Court

BRIEF IN OPPOSITION OF RESPONDENT DEL E. ROMERO

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SUMMARY OF ARGUMENT

The State of New Mexico has asked this Court to review the decision of the New Mexico Supreme Court in two consolidated criminal cases, *State v. Romero* and *State v. Gutierrez*. The sole question presented by these cases is whether various tracts of land that lie within the original boundaries of Pueblo Indian land grants that Congress confirmed and that this Court determined are Indian country – tracts that were later patented to non-Indians under the provisions of the Pueblo Lands Act, Act of June 7, 1924, ch. 331, 43 Stat. 636 ("PLA") – retain their "Indian country" status. In a soundly reasoned decision, the New Mexico Supreme Court answered that question in the affirmative. That decision is not in conflict with any decision of this Court or of any federal court of appeals. While the case was pending, moreover, Congress enacted legislation that confirmed the allocation of federal, state and tribal jurisdiction over such tracts for all future criminal cases, thus conclusively resolving the criminal jurisdiction issue. The State's contention that as a result of the decision below, " 'prosecution-free' zones currently exist on certain parcels of land in New Mexico," Petition at 28, is therefore untrue. There is no need for this Court to exercise its extraordinary power of review on writ of certiorari in these cases.

ARGUMENT

I. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR ANY APPELLATE COURT.

In the decision below, the New Mexico Supreme Court carefully examined this Court's ruling in *United States v. Sandoval*, 231 U.S. 28 (1913), analyzed the history, purpose and meaning of the federal "Indian country" statute, 18 U.S.C. § 1151, and thoroughly reviewed the terms of and the congressional intent behind the PLA, in light of the extensive body of case law from this Court examining the question whether a particular act of Congress that allowed the patenting of Indian lands to non-Indians had the effect of diminishing Indian country. The court reviewed in detail this Court's decision in *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998), and carefully applied the test laid down in that decision in finding that Pueblo lands are "dependent Indian communities" under that test. It also held that the two tracts of land at issue in these cases, that had been patented under the terms of the PLA, remain Indian country, as no "diminishment" intent could be discerned in the PLA, and it thus concluded that crimes committed by Indians on such lands remain subject to exclusive federal (or tribal), not state, jurisdiction. *State v. Romero*, 2006-NMSC-039, ¶ 26, 142 P.3d 887, 896.

The State contends that this Court should reverse the New Mexico Supreme Court, arguing that under the *Venetie* test the patented lands on which the crimes occurred in these cases could not be deemed to be Indian country. As will be explained, however, *infra*, Part II, the State simply misapplies the *Venetie* test, and nothing in that decision conflicts with the decision below. The State's

claim that the federal district court for New Mexico and the Tenth Circuit Court of Appeals "have consistently decided that private, fee-simple land within the exterior boundaries of a Pueblo land grant is not a dependent Indian community," Petition at 28, is simply untrue. The only federal district court decision that supports the State's claim is *United States v. Gutierrez*, No. CR-00-M-376 H, slip op. (D.N.M. Dec. 1, 2000), a two-page unreported district court ruling on a motion, that is practically devoid of any analysis. *See* Petition at 14-15. The State's Petition also purports to rely on *United States v. Arrieta*, 436 F.3d 1246 (10th Cir.), *cert. denied*, ___ U.S. ___, 126 S.Ct. 2368 (2006), *see* Petition at 14, but that case does not discuss, and has no bearing on, the issues addressed here, as the crime in that case occurred on land that has always been owned by the Pueblo. To counsel's knowledge, after extensive research, the Tenth Circuit has never ruled on this issue.

In fact, the New Mexico Supreme Court decision is completely in accord with the only previous reported decision on point (besides the two New Mexico Court of Appeals decisions that were reversed by the decision below), *State v. Ortiz*, 105 N.M. 308, 731 P.2d 1352 (Ct.App. 1986). In short, the decision below merely reestablishes the longstanding understanding of the jurisdictional status of privately held tracts within Pueblo grants, rejecting the aberrant view taken in *Gutierrez*.

II. THE NEW MEXICO SUPREME COURT CORRECTLY HELD THAT PUEBLO GRANT LANDS ARE "DEPENDENT INDIAN COMMUNITIES," AND THUS INDIAN COUNTRY, UNDER THE *VENETIE* ANALYSIS, AND THAT THAT STATUS HAS NEVER BEEN DIMINISHED BY CONGRESS.

Contrary to the State's assertions, the New Mexico Supreme Court expressly relied on and correctly applied this Court's *Venetie* decision. The State's argument simply misapprehends the proper purpose and application of the test this Court approved in that case. In fact, the holding in *Venetie* has special significance with respect to Pueblo lands in New Mexico, a full understanding of which requires a brief account of the distinctive history of Pueblo lands and of the relationship of the Pueblo Indian tribes to the United States government.

A. The History of Federal Authority Over Pueblo Lands Demonstrates Their Indian Country Status.

When the United States acquired the territory of New Mexico from Mexico by the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (July 4, 1848), Congress acted quickly to assert the full measure of federal protection and supervision over the Pueblo Indians and their lands. By the Act of Feb. 27, 1851, c. 13, §§ 5, 7, 9 Stat. 574, 587, Congress extended the provisions of the Indian Nonintercourse Act[1] to the Territory of New Mexico, and it authorized the appointment of

[1] The Nonintercourse Act, now codified at 25 U.S.C. § 177, prohibits any loss or transfer of lands or any interest therein by any Indian tribe except with the approval of Congress.

four Indian agents for New Mexico. In 1854, as a first step in ascertaining the private titles that had been established under Spanish and Mexican rule, Congress created the office of Surveyor-General for New Mexico, and it directed the Surveyor-General, as one of his first tasks, to report on the location, population, and title status of each of the Pueblos and their land grants. Act of July 22, 1854, ch. 103, § 8, 10 Stat. 308, 309. The first Surveyor-General, William Pelham, reported back to the Secretary of the Interior on September 30, 1856, noting that most of the Pueblo Indian tribes had grants of land made by the Spanish territorial governor, and recommending the confirmation of those Spanish land grants held by thirteen Pueblos. Sen. Ex. Doc. No. 5, 24th Cong., 2d Sess. (1856), at 411.

Congress acted on that recommendation, confirming all of the Pueblo grants (including those of Taos and Pojoaque Pueblos, which are at issue in the instant cases) in 1858, Act of Dec. 22, 1858, ch. 5, 11 Stat. 374. Each Pueblo was then issued a patent for the lands embraced by its grant. Thereafter, Congress regularly included the Pueblo Indians among the Indian tribes and bands being served by the federal Indian Service. It maintained agents to oversee their needs, appropriated funds for schools, agricultural implements and seed, irrigation works and other purposes, and, at least as early as 1898, employed a Special Attorney for the Pueblos to represent them in litigation in the courts of the territory. *Sandoval*, 231 U.S. at 39-40 and n.1.

In 1877, however, the federal judicial branch took a different course, one that was directly at odds with established federal policy and action. In *United States v. Joseph*, 94 U.S. 614 (1877), this Court held that the Pueblo

Indians could not be considered "Indians" within the meaning of the Nonintercourse Act. That decision, which appeared to take Pueblo lands out from under the protection of federal law restrictions on alienation, exacerbated the flood of non-Indian encroachments onto Pueblo lands. During the ensuing decades, thousands of non-Indians, some with deeds obtained in various ways from the tribes, some without, established homes and farms on the Pueblo grants. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 240-43 (1985). But as this Court explained in *Sandoval*, notwithstanding the *Joseph* decision Congress and the executive branch continued to treat the Pueblo Indians as Indians under federal authority and supervision, like all other Indian tribes. *Sandoval,* 231 U.S. at 40-44.

Congress' determination to continue to apply federal Indian country laws to the Pueblos and their lands ultimately led this Court to reconsider the Pueblos' status. In *Sandoval*, this Court acknowledged that, in the face of *Joseph*, Congress had consistently treated the Pueblos as "dependent communities entitled to [the government's] aid and protection, like other Indian tribes," and it held that that determination "must be regarded as both authorized and controlling." 231 U.S. at 46-47. That being so, the Court upheld Congress' authority to control the entry of liquor into Pueblo grant lands, under the statute, the modern version of which is codified at 18 U.S.C. § 1154, prohibiting the introduction of intoxicating beverages into "Indian country."

By undermining the premise of *Joseph*, and holding that the Pueblo Indians were indeed Indians, whose lands were fully subject to federal superintendence, *Sandoval* "cast a pall" over the titles of the non-Indians who had

settled on Pueblo lands, "suggesting that the Pueblos had been wrongfully dispossessed of their lands." *Mountain States*, 472 U.S. at 243. The non-Indians' worst fears were soon realized. Within a few years after the decision in *Sandoval*, the United States Attorney began filing thousands of ejectment suits against non-Indians who had settled on Pueblo grant lands. The ensuing political uproar led to the enactment of the PLA in 1924, to "'settle the complicated questions of title *and to secure for the Indians all of the lands to which they are equitably entitled.*'" *Mountain States*, 472 U.S. at 244 (quoting S. REP. NO. 492, 68th Cong. 1st Sess. at 5 (1924)) (emphasis added).

The PLA allowed non-Indians residing on Pueblo lands to file claims to the lands they were occupying, and if they could show that they satisfied certain criteria as to length and exclusiveness of occupancy, color of title, and payment of taxes, they would receive the equivalent of quitclaim deeds from the United States for those lands, with the Pueblos receiving compensation at fair market value. PLA, §§ 4, 6, 13. This compensation was available to be used by the Secretary of the Interior to acquire replacement lands, preferably through reacquisition of patented lands within Pueblo grants, evincing Congress' purpose to preserve the Pueblos' land bases as much as possible. *Id.*, § 19. Today, virtually all remaining non-Indian-owned lands within the exterior boundaries of Pueblo grants in New Mexico – including the tracts on which the crimes in the instant cases occurred – derive from quitclaim deeds issued to claimants under the PLA.

Two years after Congress enacted the PLA, this Court decided *United States v. Candelaria*, 271 U.S. 432 (1926), in which it expressly held that the Pueblos were "Indian tribes" within the meaning of the Nonintercourse Act, and

that their lands were Indian country, fully protected by federal law. *Candelaria* expressly overruled *Joseph* and put to rest the unfortunate aberration that it had represented. *See also United States v. Chavez*, 290 U.S. 357 (1933) (holding that Pueblo grant lands are "Indian country" within terms of predecessor to Indian Country Crimes Act, 18 U.S.C. § 1152).

B. This Court's Ruling in *Venetie* Confirmed that Pueblo Lands are "Dependent Indian Communities."

As this Court noted in *Venetie*, when Congress enacted a definition of "Indian country" at 18 U.S.C. § 1151[2] in 1948, the drafters lifted the "dependent Indian community" language of § 1151(b) "virtually verbatim" from *Sandoval*. 522 U.S. at 530. *Venetie* was this Court's first occasion to consider that language, however. The various courts of appeals had developed elaborate tests for determining

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[2] Section 1151 reads, in pertinent part, as follows:

> "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States, . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

That section constituted the first legislative definition of Indian country since the 1834 Indian Nonintercourse Act, *see* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 183-89 (Nell Jessup Newton, ed., 2005). It was actually enacted as part of the Indian Major Crimes Act, 18 U.S.C. §§ 1151-53, but it has repeatedly been cited by this Court as defining Indian country for all jurisdictional purposes, both civil and criminal. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 n.5 (1987); *DeCoteau v. Dist. County Court*, 420 U.S. 425, 427 n.2 (1975).

whether lands owned or occupied by Indians, that could not be considered reservations or allotments, and thus were not Indian country under § 1151(a) or (c), constituted "dependent Indian communities."[3] This Court rejected that approach, and instead examined the two factors that it had traditionally relied upon in its Indian country jurisprudence, specifically, whether the lands were validly "set aside" for Indian use and occupancy by some affirmative act of the government, and whether they remained under "federal superintendence." *Venetie*, 522 U.S. at 527. That test was derived directly from this Court's earliest Indian country decisions, including cases such as *United States v. Pelican*, 232 U.S. 442, 449 (1914) and *United States v. McGowan*, 302 U.S. 535, 538-39 (1938).

Because the language under consideration was taken from *Sandoval*, however, this Court examined Congress' treatment of Pueblo lands, to confirm that its view of the intent of the phrase was consistent with the holding in *Sandoval*. It noted that although the Pueblos owned their lands in fee, Congress had acted quickly to assert federal authority over those lands by extending the provisions of the Nonintercourse Act to them, and it found that that amounted to a federal "set aside" of those lands under federal superintendence. 522 U.S. at 528 and n.4. *Venetie* thus confirms that Pueblo lands were formally recognized as Indian country almost immediately after the United States acquired the territory of New Mexico.

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[3] For example, the Ninth Circuit, in the decision under review in *Venetie*, applied a "six-factor balancing test" for interpreting that phrase. *Venetie*, 522 U.S. at 525.

A principal thrust of the State's argument is that the *Venetie* test of whether an area should be considered a "dependent Indian community" should be applied to each individual tract that was patented under the PLA. *See* Petition at 25-26. But the Tenth Circuit Court of Appeals has repeatedly held that the *Venetie* test properly looks to the entire Indian community, not just individual tracts, in making the Indian country determination. *United States v. Arrieta*, 436 F.3d at 1250; *HRI, Inc. v. Envtl. Prot. Agency*, 198 F.3d 1224, 1249 (10th Cir. 2000). That was likewise the conclusion of the court below, *Romero*, 2006-NMSC-039, ¶ 16, 142 P.3d at 892, and that conclusion is of course fully consistent with the statutory language itself.

More importantly, the *Venetie* test is directed at the question of whether, *in the first instance*, lands allocated to Indians constitute Indian country. That was the situation presented in *Venetie*, which involved the jurisdictional status of lands that were patented to Alaskan native village corporations under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* ("ANCSA"). ANCSA imposed a new and unique regime with respect to Alaskan native land holdings, clearing the way for construction of the Alaska pipeline. It expressly abolished all claims of aboriginal title to Alaskan lands and all Indian reservations in the state (except one), and created 13 regional and over 200 village native corporations, chartered under state law, the stock in which is held by the native residents of the regions and the villages, respectively. *Id.* at §§ 1603, 1606, 1607, 1618(a). Approximately 38 million acres of land were patented to the various regional and village corporations, allocated according to a complex formula. *Id.* at §§ 1611-15. The lands are owned by the corporations in fee; the United States has no

interest in them, and the lands are freely alienable. *Id.* at § 1613. Although many Alaska native villages are themselves federally recognized Indian tribes, and are organized under the provisions of the Indian Reorganization Act ("IRA"), especially 25 U.S.C. § 477, the IRA entities were given no role in the scheme of ANCSA.

The question presented in *Venetie* was whether this brand new regime of Indian land holdings warranted "Indian country" designation for the lands patented to the village corporations, thus immunizing the Alaskan natives and their activities on those lands from state authority and regulation. The argument of the Alaskan natives was that the villages constituted "dependent Indian communities" within the meaning of § 1151(b), and that their lands were thus Indian country under that subsection. This Court disagreed. The ANCSA lands, the Court determined, failed both prongs of the "set aside" and "superintendence" test. *Venetie*, 522 U.S. at 532.

In contrast, as this Court specifically noted, the lands that were granted to the Pueblos by the Spanish territorial government have long since been determined to be "dependent Indian communities," and thus Indian country, based on facts that this Court viewed as fully satisfying its *Venetie* test. 522 U.S. at 528. There is thus no reason to apply the *Venetie* test *again* to the Pueblos.

C. For Jurisdictional Purposes, Pueblo Land Grants Are Equivalent to Reservations, and They Were Not Diminished by the PLA.

Rather, the question to be asked in the instant cases is whether, by authorizing the patenting of individual tracts of Pueblo lands within Pueblo grants to non-Indians under

the provisions of the PLA, Congress intended to *diminish* Pueblo Indian country. That question, as the New Mexico Supreme Court correctly reasoned, must be answered by examining the text of and congressional intent behind the PLA, in the light of this Court's extensive body of "Indian country diminishment" case law, including *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. Dist. County Court,* 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); and *Seymour v. Superintendent*, 368 U.S. 351 (1961). As this Court observed in *Solem*, 465 U.S. at 470, the Indian country status of land, once established, may be altered only by Congress.[4] And diminishment, this Court cautioned, "will not be lightly inferred." *Id.* Indeed, "[w]hen both an Act [allowing patenting of Indian lands to non-Indians] and its legislative history fail to provide *substantial and compelling evidence* of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place." *Id.* at 472 (emphasis added).

The New Mexico Supreme Court closely examined the PLA's language and history, and could find no indication whatever that Congress intended any diminishment of Pueblo Indian country by the patenting of individual

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[4] As a prominent Indian law scholar put it in a frequently-cited article on Indian country jurisdiction, "[o]nce a reservation has been established, or a dependent Indian community shown to exist, it will remain 'Indian country' until terminated by Congress, irrespective of the nature of the land ownership." Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 513 (1976).

tracts to non-Indians. *Romero,* 2006-NMSC-039 ¶ 25, 142 P.3d at 896. But the State's Petition ignores this analysis altogether. The State insists that applying the *Venetie* test to Pueblo lands that were patented to non-Indians demonstrates that these lands cannot be considered "dependent Indian communities." *See, e.g.*, Petition at 16. As noted *supra*, p. 10, the State errs fundamentally in urging the application of the test to individual tracts conveyed to non-Indians. The State's premise is equally flawed, however, in its insistence that solely because Pueblo grant lands are not "reservations," a change in the title of a tract within a Pueblo grant, alone, automatically changes the tract's Indian country status.

Were Pueblo grant lands formally designated "reservations" there would be no dispute here at all as to the correctness of the decision below: the Indian country statute expressly declares that "*all land* within the limits of any Indian reservation . . . , notwithstanding the issuance of any patent, . . . " is Indian country. 18 U.S.C. § 1151(a) (emphasis added). By that language "Congress uncouple[d] reservation status from Indian ownership," by statutorily defining Indian country "to include lands held in fee by non-Indians within reservation boundaries." *Solem*, 465 U.S. at 468. The State urges that no such "uncoupling" applies to Pueblo grants, and that the decision below erred by blurring "the important distinctions between a reservation and a dependent Indian community." Petition at 18. The State argues that since 18 U.S.C. § 1151(b) contains no language comparable to the "notwithstanding the issuance of any patent" phraseology in § 1151(a), patented lands within Pueblo grants are not Indian country. Petition at 18-19 and n.5. There are two fundamental errors in this proposition: first, there are *no*

"important distinctions" between Pueblo grant lands and other Indian reservations for federal Indian law purposes; and second, the State's reading of § 1151(b) turns a major purpose of that statute on its head.

Although, as explained above, the history of Pueblo land grants is distinctive, once *Candelaria* clearly established that those lands are Indian country, and once Congress had enacted the PLA to deal with the problem of non-Indian trespass on Pueblo lands, Congress thereafter made sure that Pueblo lands were treated exactly the same as Indian reservations for virtually all federal law purposes. The decision below contains a lengthy catalogue of congressional enactments demonstrating that the full array of federal laws affecting Indians and their lands have been applied to Pueblo grant lands just as they have been applied to other Indian lands, and that, indeed, Congress has frequently used the term "reservations" to refer to Pueblo grants themselves. *Romero*, 2006-NMSC-039 ¶ 19, 142 P.3d at 894. As the court noted, "[t]he State does not provide any example of Congress treating a pueblo distinctly from a reservation, especially not for the purposes of criminal jurisdiction in Indian country." *Id.* Nor does the State offer anything new on that score in its Petition.[5] The State's suggestion, thus, that Congress

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[5] The State's Petition frequently cites the leading treatise in the field, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton ed., 2005) ("COHEN"), *see, e.g.*, Petition at 19 n.5, but it fails to quote this critical passage from the text following the footnote that the State does cite:

> The inclusion of Pueblos in numerous federal statutory schemes, such as the Indian Reorganization Act, and the federal environmental laws, that apply only to "reservations" strongly suggests that Congress has intended that Pueblo lands be equated with reservations.

(Continued on following page)

deliberately intended § 1151 to subject Pueblos (and other "dependent Indian communities") to a different jurisdictional regime from that applicable to Indians living on reservations has no basis in fact or in law, and is contrary to consistent congressional practice both before and since the enactment of that statute.

The State's view of § 1151(b) is moreover directly contrary to a major purpose of that statute. This Court explained the point in *Seymour*, in response to an argument that the "notwithstanding the issuance of any patent" language in § 1151(a) should be interpreted to mean only patents to Indians:

> [W]here the existence or nonexistence . . . of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. *Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151* and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate the confusion Congress specifically sought to avoid.

368 U.S. at 358 (footnote omitted; emphasis added). That passage speaks directly to the State's contention here. It is

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COHEN at 336 (footnotes omitted); *and see id.* at 195 ("Thus, patented parcels of land and rights-of-way may also be within Indian country, if they are within a dependent Indian community.").

highly improbable that Congress would have acted specifically to avoid "checkerboard" jurisdiction in subsection (a) of § 1151, but would have carefully preserved the checkerboard in subsection (b). The State offers no plausible policy or legal justification for such a result, yet that is the plain consequence of the State's argument.

In short, there is simply no error in the decision below. The State's repeated invocation of *Venetie* misses the point that Pueblo grant lands were long ago found to be Indian country, as *Venetie* confirms, and there is thus no occasion to reapply the *Venetie* test to individual tracts within those grants. The proper approach to the question posed by these cases is found in this Court's Indian country "diminishment" analysis, and as the New Mexico Supreme Court found, there is no evidence of congressional intent to diminish Pueblo Indian country in the PLA. The State's insistence that Congress must have intended that "dependent Indian communities" be subjected to a checkerboarded jurisdictional regime under 18 U.S.C. § 1151, while carefully avoiding that confusion in the case of Indian reservations, makes no sense, and is directly contrary to Congress' treatment of Pueblo lands in every other context.

III. CONGRESS' RECENT AMENDMENT OF THE PUEBLO LANDS ACT CONCLUSIVELY DEMONSTRATES THE CORRECTNESS OF THE DECISION BELOW, AND RENDERS THE STATE'S PETITION ACADEMIC.

The State's Petition fails to inform the Court that while the instant cases were pending before the New Mexico Supreme Court, Congress enacted Pub.L. 109-133, 119 Stat. 2573 (2005) ("Pub.L. 109-133"), as an amendment to the

PLA, that conclusively establishes that crimes committed by or against Indians "anywhere within the exterior boundaries" of a Pueblo grant are subject to federal (and, with respect to crimes by Indians, tribal) jurisdiction. This congressional determination is completely consistent with the ruling of the New Mexico Supreme Court herein, and overrides the contrary arguments of the State.[6]

Properly construed, Pub.L. 109-133 ought to be viewed as a clarification of Congress' original intent as to the jurisdictional effect of the issuance of patents under the PLA itself, and thus should control the outcome of the instant cases.[7] Regardless, it unquestionably establishes the jurisdictional rules for all future such cases, and thus eliminates any jurisdictional confusion as to these tracts. As a result, there is no remaining "important question of federal law that has not been, but should be, settled by

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[6] The State's Petition notes that Congress amended the PLA, Petition at 10 n.1, but fails to give any information as to the substance of the amendment. It does note that the amendment "has been interpreted to apply prospectively," citing *Arrieta*, but as noted above, the amendment would have had no impact in *Arrieta* regardless, inasmuch as the land on which the crime in that case occurred is and always has been tribally owned land. *Arrieta*'s comments on the applicability of the enactment, thus, were *dicta*, and in any event were based solely on the fact that the United States and Mr. Arrieta both agreed that the amendment should only apply prospectively. *See* 436 F.3d at 1251.

[7] The New Mexico Supreme Court was made aware of the enactment of Pub.L. 109-133 after these cases had been briefed and argued, but it did not ask for further briefing on its effect, if any, on the cases before it. It stated in a footnote that it viewed the enactment as helping to "clarify congressional intent regarding jurisdiction," but not as being directly applicable to the cases before it inasmuch as it was enacted after the alleged crimes had occurred. 2006-NMSC-039, ¶ 1 n.1, 142 P.3d at 888 n.1. *But see infra* pp. 21-23.

this Court." Sup. Ct. R. 10(c). Congress has settled the question.

Pub.L. 109-133 added a new Section 20 to the PLA, that reads, in its entirety, as follows:

> Section 20. Criminal Jurisdiction
>
> (a) *In General.* – Except as otherwise provided by Congress, jurisdiction over offenses committed *anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico*, shall be as provided in this section.
>
> (b) *Jurisdiction of the Pueblo.* – The Pueblo has jurisdiction, as an act of the Pueblo's inherent power as an Indian tribe, over any offense committed by a member of the Pueblo or an Indian as defined in title 25, sections 1301(2) and 1301(4), or by any other Indian-owned entity.
>
> (c) *Jurisdiction of the United States.* – The United States has jurisdiction over any offense described in chapter 53 of title 18, United States Code, committed by or against an Indian as defined in title 25, sections 1301(2) and 1301(4) or any Indian-owned entity, or that involves any Indian property or interest.
>
> (d) *Jurisdiction of the State of New Mexico.* – The State of New Mexico shall have jurisdiction over any offense committed by a person who is not a member of a Pueblo or an Indian as defined in title 25, sections 1301(2) and 1301(4), which offense is not subject to the jurisdiction of the United States.

Pub.L. 109-133 (emphasis added). These jurisdictional rules, by their terms, apply "anywhere within the exterior boundaries" of the Pueblo grants, and thus resolve the jurisdictional issue with respect to lands within grant boundaries that were patented to non-Indians.

In the course of consideration of the bill that became Pub.L. 109-133, Rep. Radanovich of California, who led the floor discussion of the bill in the House of Representatives, gave a detailed explanation of the circumstances that gave rise to the need for the legislation:

> Mr. Speaker, S.279, a bill sponsored by Senator Domenici [of New Mexico], clarifies the uncertainty and potential law enforcement jurisdiction problems on all 19 Indian Pueblo reservations in the State of New Mexico.
>
> From 1913 to 2001, the United States Government prosecuted crimes committed by or against the New Mexico Pueblo Indians within the exterior boundaries of their reservation lands in the State of New Mexico. However, in 2001, a federal judge, relying on a case about tribal jurisdiction in the State of Alaska, ruled that felonies committed by Indians on private lands within the boundaries of New Mexico Pueblos are not subject to Federal jurisdiction. The U.S. Attorney for New Mexico did not appeal the decision and, therefore, has failed to prosecute any felonies by or against Indians on these lands.
>
> At the same time that the Federal Government was declining to prosecute any felonies on Indian Pueblo lands, a New Mexico State court ruled that the State of New Mexico lacked jurisdiction to prosecute felonies committed by an Indian defendant against a non-Indian on private

> lands within the Pueblos. As a result, there is currently a large void in criminal jurisdiction at the Federal, State and tribal levels.
>
> S.279 corrects this void of jurisdiction by clarifying that, one, the United States will have jurisdiction over crimes defined under the Major Crimes Act committed by or against any Indians; two, the State of New Mexico will have jurisdiction clarified as to non-member Indians or non-Indians for all non-Major Crimes Act offenses; and three, the New Mexico Pueblo governments will have jurisdiction over their individual members or other Indians for other offenses.

151 Cong. Rec. H11047 (daily ed., Dec. 6, 2005). Congressman Udall of New Mexico further elaborated on the need for and purpose of the bill:

> This legislation addresses confusion over criminal jurisdiction on Pueblo lands in New Mexico that arose out of the holding in *United States v. José Gutierrez*, an unreported decision of a federal district court judge in the district of New Mexico that overturned prior precedent regarding the jurisdictional status of the lands within the exterior boundaries of Pueblo grants.
>
> The *Gutierrez* decision created uncertainty and the potential for a void in criminal jurisdiction on Pueblo lands. Some call these prosecution-free zones. Because of the risk to public safety and law enforcement arising out of this uncertainty, it is important that we clarify the scope of criminal jurisdiction on Pueblo lands.
>
> Nothing in this legislative clarification is intended to diminish the scope of Pueblo civil jurisdiction within the exterior boundaries of

> Pueblo grants, which is defined by federal and tribal laws and court decisions.
>
> This legislation also does not, in any way, diminish the exterior boundaries of these grants.

Id. Importantly, the *Gutierrez* case, the federal district court decision that both Rep. Radanovich and Rep. Udall cite as having been contrary to prior law and having created the jurisdictional "void" on private lands within Pueblo grants that this legislation was needed to correct, is the very case that the State cites and relies upon in its Petition. *See* Petition at 14; *and see supra* p. 3.

Pub. L. 109-133 confirms that the very same jurisdictional rules that apply to Indian reservations under 18 U.S.C. § 1151(a) likewise apply to Pueblo grant lands, that is, that federal Major Crimes Act jurisdiction extends to *all* lands within the exterior boundaries of Pueblo grants. Wholly apart from the question whether the legislation should be deemed to control the outcome of the instant cases, *see infra* pp. 21-23, it unquestionably resolves the "unnecessary havoc and chaos" of which the State complains, Petition at 28, for all cases arising after its enactment. At the very most, then, this Court's consideration of these cases would affect only these two defendants.

The character of, and the circumstances leading up to, the enactment of Pub.L. 109-133, moreover, make clear that the measure was intended to clarify the original congressional intention in the PLA itself, and it thus should be deemed to apply to the instant cases as well as to future ones. Federal courts recognize that legislative enactments that "are only 'clarifying,' as opposed to 'substantive,'" may be applied to cases that arose prior to the enactment. *Valles v. Ivy Hill Corp.*, 410 F.3d 1071,

1079 (9th Cir. 2005); *United States v. Groves*, 369 F.3d 1178, 1182 (10th Cir. 2004);[8] *Vasquez v. N. County Transit Dist.*, 292 F.3d 1049, 1056 (9th Cir. 2002); *Pierce v. Hobart Corp.*, 939 F.2d 1305, 1308 (5th Cir. 1991). This Court has "sanctioned the application to all pending and future cases of 'intervening' statutes that merely 'confe[r] or ous[t] jurisdiction.'" *Austria v. Altman*, 541 U.S. 677, 693 (2004) (*quoting Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994)).

By definition, an enactment that merely serves to clarify what was intended all along as the legal rule is not being applied "retroactively," even where it is cited as authority in a case that arose prior to the enactment, since by its terms it is not changing the pre-existing law. *Western Security Bank v. Superior Court*, 15 Cal.4th 232, 243, 933 P.2d 507, 514 (1997) ("a statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment . . . Such a legislative act has no retrospective effect because the true meaning of the statute remains the same.") (emphasis in original; citations omitted).

There can be little doubt that Pub.L. 109-133 was intended to "clarify" criminal jurisdiction following the issuance of patents under the PLA, not to make new law. The fact that Congress amended the PLA, rather than simply enact a free-standing law, indicates that its intent was to make clear what was originally intended by that 80-year-old statute. Statements on the floor of the House

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[8] Though a sentencing guidelines case, the case was decided according to constitutional principles arising from the *ex post facto* clause, and those principles should apply equally here.

of Representatives by Rep. Udall of New Mexico and Rep. Radanovich of California, quoted above, consistently referred to the bill as one that would "clarify" the jurisdiction of the State, the United States and Pueblos within the exterior boundaries of Pueblo grants. They also noted that the bill was needed to correct a recent, aberrant court decision, to make clear that the earlier, and longstanding, understanding of the law was correct. *Cf.* 1A SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 22.31, p. 279 (5th ed. 1993) ("An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute.") (footnote omitted).

In short, Pub.L. 109-133 is a congressional declaration intended to clarify what Congress had originally intended as the jurisdictional consequence of the patenting of individual parcels of land to non-Indians under the PLA, demonstrating that the patenting effected no change in the Indian country status of those lands. While it should thus authoritatively settle the jurisdictional issue for all cases, whenever they arose, at a minimum it resolves the issue presented by the instant cases for all future purposes, and should render unnecessary the expenditure of this Court's time and resources in addressing this issue.

CONCLUSION

For the foregoing reasons, Respondent Romero respectfully urges that this Court deny the State's Petition.

Respectfully submitted,

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In The

Supreme Court of the United States

STATE OF NEW MEXICO,

Petitioner,

vs.

DEL E. ROMERO and MATTHEW GUTIERREZ,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of New Mexico

BRIEF IN OPPOSITION OF RESPONDENT MATTHEW GUTIERREZ

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QUESTION PRESENTED

Whether, in the aftermath of congressional action clarifying the allocation of the competing criminal jurisdictional interests of the Indian Pueblos of New Mexico, the State of New Mexico, and the United States, over Indians within the Pueblos, there is any case or issue warranting Court review.*

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* Petitioner frames the question as follows:

I. Whether the New Mexico Supreme Court misinterpreted and misapplied the exclusive Federal definition of a dependent Indian community in 18 U.S.C. § 1151(b) and interpreted in the unanimous opinion, *Alaska v. Native Vill. of Venetie Tribal Gov't,* 522 U.S. 529 (1998), for purposes of determining Federal criminal jurisdiction when the New Mexico Supreme concluded:

> A. Alleged crimes committed by an Indian in private, fee simple lands within the original exterior boundaries of a Pueblo land grant in which all Indian and United States title had been extinguished pursuant to the Pueblo Lands Act of 1924 satisfied the Federal set-aside requirement of land for the use and enjoyment of an Indian community; and
>
> B. The Federal superintendence requirement of *Venetie* was satisfied because the alleged crimes occurred on lands located within the original exterior boundaries of Pueblo land grants event though no evidence of Federal superintendence over the land was established?

II. Whether the New Mexico Supreme Court created an intolerable jurisdictional quagmire where no Federal or state criminal jurisdiction may be invoked because certain lands within the original exterior boundaries of a Pueblo land grant are effectively prosecution-free zones?

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OPINIONS BELOW

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STATUTES OR OTHER PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

18 U.S.C. § 1151:

> Except as otherwise provided in sections 1154 and 1156 of title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Constitution of the United States, Article VI, Supremacy Clause:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Pueblo Land Act Amendments of 2005, 119 Stat. 2573:

> An Act to amend the Act of June 7, 1924, to provide for the exercise of criminal jurisdiction.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
>
> SECTION 1. INDIAN PUEBLO LAND ACT AMENDMENTS.
>
> The Act of June 7, 1924 (43 Stat. 636, chapter 331), is amended by adding at the end of the following:
>
> > "SEC. 20. CRIMINAL JURISDICTION.
> >
> > "(a) IN GENERAL. – Except as otherwise provided by Congress, jurisdiction over offenses committed anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico, shall be as provided in this section.
> >
> > "(b) JURISDICTION OF THE PUEBLO. – The Pueblo has jurisdiction, as an act of the

Pueblos' inherent power as an Indian tribe, over any offense committed by a member of the Pueblo or an Indian as defined in title 25, sections 1301(2) and 1301(4), or by any other Indian-owned entity.

"(c) JURISDICTION OF THE UNITED STATES. – The United States has jurisdiction over any offense described in chapter 53 of title 18, United States Code, committed by or against an Indian as defined in title 25, sections 1301(2) and 1301(4) or any Indian-owned entity, or that involves any Indian property or interest.

"(d) JURISDICTION OF THE STATE OF NEW MEXICO. – The State of New Mexico shall have jurisdiction over any offense committed by a person who is not a member of a Pueblo or an Indian as defined in title 25, Sections 1301(2) and 1301(4), which offense is not subject to the jurisdiction of the Unites States."

STATEMENT OF THE CASE

State of New Mexico vs. Matthew Gutierrez

Matthew Gutierrez[1] is an enrolled member of the Pueblo of Pojoaque and was arrested by the Pojoaque

[1] Respondent Matthew Gutierrez is not to be confused with Jose Gutierrez, an enrolled member of the Pueblo of Santa Clara, whose motions to dismiss a Federal criminal indictment against him were, first, denied, by a Federal magistrate, *United States v. Gutierrez*, Cr. No. 00-M-375, Dkt. No. 14 (D. N.M. June 21, 2000), and subsequently granted by the United States District Court for the District of New

(Continued on following page)

Tribal Police following a stabbing incident in August 2002. All of the alleged crimes occurred on fee simple land located within the original exterior boundaries of the Pueblo of Pojoaque land grant.

Upon notification of the alleged crime, the Pueblo of Pojoaque Tribal Police contacted the Federal Bureau of Indian Affairs' Tribal Police. After investigation, the tribal law enforcement officials prosecuted the case in the Pueblo of Pojoaque Tribal Court ("Tribal Court") and also referred the case to the U.S. Attorney for prosecution.

Gutierrez was arraigned in Tribal Court and charged with multiple violations of the Pojoaque Tribal Law and Order Code. Gutierrez did not contest the criminal jurisdiction of the Tribal Court. The U.S. Attorney for the District of New Mexico declined to prosecute because of a decision by a Federal magistrate concerning criminal jurisdiction within the Pueblos.

After the Tribal prosecution was commenced, the State of New Mexico indicted Gutierrez alleging multiple violations of state law, all based on the same underlying incident. The Tribal Court's Chief Judge issued an opinion finding that the Tribal Court had jurisdiction to prosecute Gutierrez. Gutierrez moved to dismiss the State indictment due to the State's lack of jurisdiction on the ground that the alleged crimes occurred on lands considered "Indian country" and within the jurisdiction of the United States.

Mexico, *United States v. Gutierrez*, Cr. No. 00-M-375, Dkt. No. 31 (D. N.M. Dec. 4, 2000).

In the February 2004 trial, Gutierrez's motion to dismiss for lack of State jurisdiction was granted, with the court finding that "the State does not have criminal jurisdiction over Indians within the exterior boundaries of the Pueblo of Pojoaque." App. 81 ¶ 11. On appeal by the State, the New Mexico Court of Appeals reversed. The Court interpreted the Pueblo Lands Act of 1924[2] and held that the State does have criminal jurisdiction over crimes committed by Indians on private fee simple land located within the exterior boundaries of Pueblo lands within the State of New Mexico.

In June 2006, the New Mexico Supreme Court reversed the New Mexico Court of Appeals. The New Mexico Supreme Court held that because of ongoing Federal superintendence and involvement over the lives of Pueblo Indians on all land – Pueblo-owned or privately held – within the exterior boundaries of the Pueblo, the State lacked criminal jurisdiction over Gutierrez. App. 22-23.

The New Mexico Supreme Court also properly concluded that privately held fee lands within the exterior boundaries of the Pueblo of Pojoaque are "Indian country" lands within the meaning of 18 U.S.C. § 1151(b) and further noted that the U.S. Congress has not acted to extinguish or otherwise change the Indian country status of such lands.

In fact, the opposite is true. The Indian Pueblo Land Act Amendments of 2005, 119 Stat. 2573 ("Pueblo Land Act Amendments of 2005"), evince clear congressional intent on the proper exercise of criminal jurisdiction on

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[2] *See* Act of June 7, 1924, chap. 331, 43 Stat. 636 ("Pueblo Lands Act of 1924").

lands within the exterior boundaries of Pueblo lands in the State of New Mexico.

SUMMARY OF ARGUMENT

The U.S. Congress has plenary authority over Indian Tribes and Indian affairs, including the Pueblos of New Mexico. The enactment of the Pueblo Land Act Amendments of 2005 affirmed the Congress' deliberated policy of protecting the Pueblos from the exercise of State criminal jurisdiction over Indian defendants within the exterior boundaries of the Pueblos. In light of the enactment of the Pueblo Land Act Amendments of 2005, the criminal jurisdiction issues giving rise to the New Mexico Supreme Court's decision are not capable of repetition and are not worthy of review by this Court.

REASONS FOR NOT GRANTING THE WRIT

I. CONGRESS ACTED WITH ALACRITY AND SPECIFICITY TO ELIMINATE AMBIGUITIES ABOUT CRIMINAL JURISDICTION BY ENACTING THE PUEBLO LAND ACT AMENDMENTS OF 2005.

The U.S. Congress has plenary authority over Indian tribes and Indian affairs, including the Pueblos of New Mexico. U.S. Const., Art. I, § 8, cl. 3; *see also McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973). In the 109th session of Congress (2005-2006), that body recognized the enormous potential for continued jurisdictional confusion created by various court decisions in the State of New Mexico concerning offenses committed by Indians on

land within the exterior boundaries of an Indian Pueblo. On July 26, 2005, the Pueblo Land Act Amendments of 2005 – the title of which reads, "An Act to amend the Act of June 7, 1924, to provide for the exercise of criminal jurisdiction" – was considered and approved by the U.S. Senate. 151 Cong. Rec. S9,055 (daily ed. July 26, 2005). On December 6, 2005, the legislation was duly considered and approved by the U.S. House of Representatives. 151 Cong. Rec. H11,047 (daily ed. Dec. 6, 2005). On December 20, 2005, President George W. Bush signed the legislation into law.

Respondent Gutierrez asserts that the Pueblo Land Act Amendments of 2005 comport with both the congressional intent of the Pueblo Lands Act of 1924 and the New Mexico Supreme Court's decision in *State v. Romero*. The questions presented in this writ have been rendered moot by the enactment of the Pueblo Land Act Amendments of 2005, which affirmed the congressional policy of protecting the Indian Pueblos and their members from the exercise by the State of criminal jurisdiction over Indians within the exterior boundaries of the Pueblos.

II. FEDERAL POLICY REGARDING THE INDIAN PUEBLOS, AND SPECIFICALLY RELATING TO QUESTIONS OF JURISDICTION, HAS BEEN REPEATEDLY AFFIRMED BY THE U.S. CONGRESS.

Although the Territory and State of New Mexico established an entirely unsuccessful pattern of attempting to obviate Federal jurisdiction within the Indian Pueblos, congressional action and the decisions of this Court have established and recognized Congress' continued authority

over the Indian Pueblos and crimes conducted by Indians on lands within the boundaries of the Pueblos.

Decisions by the Territorial courts that were predicated on the nonexistence of Federal jurisdiction were superseded by express actions of the U.S. Congress. In 1904, the Supreme Court for the Territory of New Mexico held in *Territory v. Delinquent Tax Payers*, 76 P. 307 (N.M. 1904), that Pueblo lands were subject to local taxation. That decision was immediately followed by an act of Congress declaring the Pueblo lands exempt from taxation. Act of March 3, 1905, chap. 1479, 33 Stat. 1048, 1069. Congress, in adopting the New Mexico Enabling Act, 36 Stat. 557 (1910) ("Enabling Act"), perpetuated the exemption.

Similarly, in *United States v. Mares*, 88 P. 1128 (N.M. 1907), the Supreme Court of the Territory of New Mexico held that Pueblo Indians and their lands were not in the terms included under a Federal law that prohibited the sale of liquor to the Indians and the introduction of liquor into Indian country or trust allotments. *See* Act of January 30, 1897, chap. 109, 29 Stat. 506. That decision was also nullified when the Enabling Act became law in 1910.

The first legislature of the State of New Mexico also attempted to obviate the intent and effects of the Enabling Act when it requested that Congress modify the Enabling Act to allow State jurisdiction over Pueblo lands to allow taxation of the Pueblo lands and free grazing within Pueblo lands without Federal interference. *See* Requesting Congress to Modify the Law in Relation to Pueblo Indians, State of New Mexico House Joint Memorial No. 7 (June 5, 1912). Congress made no modifications to the Enabling Act.

In 1913, this Court rendered its decision in *United States v. Sandoval*, 231 U.S. 28 (1913), and confirmed the plenary authority of Congress over the Indian Pueblos. The Court noted:

> As before indicated, by an uniform course of action beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and, considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary, but must be regarded as both authorized and controlling.

Id. at 47. After a careful review of Indian decisions, the *Sandoval* Court found that:

> [I]t may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.

Id. at 46 (quoting *Tiger v. Western Invest. Co.*, 221 U.S. 286, 315 (1911)).

Congress subsequently passed the Pueblo Lands Act of 1924. In the Senate Report accompanying the legislation, Congress recognized that:

> [i]nasmuch as by the decision of the Supreme Court of the United States [in *Sandoval*] it was held that the United States was the guardian of these Indians, it seems to follow that if such guardian by reason of negligence has allowed the property of its wards to be lost there is at least a moral, if not a legal, obligation to make reasonable restitution for the loss suffered.

S. Rep. No. 492, 68th Cong., 1st Sess., at 8 (1924).

As cited by the New Mexico Supreme Court, Congress extensively considered criminal jurisdiction questions prior to passing the Pueblo Lands Act of 1924. *See* App. 26-27 ("There is no evidence that Congress has changed criminal jurisdiction within the exterior boundaries of any pueblo. In fact, the history of the Pueblo Lands Act [of 1924] irrefutably evinces congressional intent not to change criminal jurisdiction within the exterior boundaries of the pueblos."); *see also id.* at 27 ("The final version of the Pueblo Lands Act deleted this jurisdictional section [section 3, following] despite considerable debate.").

The hearing record developed by the U.S. House Committee on Indian Affairs in the 67th Congress regarding pending legislation is also illustrative:

> Mr. BURTNESS: I want to ask you about section 3 of the bill. That is the one that gives certain jurisdiction to the State of New Mexico and its courts. Why can not that be kept out of this?
>
> Colonel TWITCHELL: Section 3 refers to segregated areas. Under the compact with the United States all of the lands owned or held by the Pueblos has [*sic*] its jurisdiction surrendered to the Congress of the United States. If a bill is passed where certain lands are segregated, certainly the people

> of New Mexico have a right to be living in something besides an "Indian country."
>
> Mr. BURTNESS: There is no question about that. Is it necessary to have any legislation whatsoever for that purpose?
>
> Colonel TWITCHELL: I do not believe it is absolutely necessary, because I think that will happen as a matter of course; but I do believe that the more certain you can make the situation down there relievable, the better is [sic] will be.

H.R. 13452 and H.R. 13674, 67th Cong., 4th Session (Feb. 1-15, 1923).

In 1926, the State of New Mexico again attempted to obviate an act of Congress when it challenged the constitutionality of the Pueblo Lands Act of 1924. This Court rejected the State's contention holding that the general statutes of limitation of the State and Territory be held to run against the Indians up to the time of Statehood, and thereafter the statutes could not under any condition run against the Pueblo Indians because Congress reserved jurisdiction over the Pueblo Indians in the Enabling Act and excluded the Pueblo Indians from the jurisdiction of the state. *See United States v. Candeleria*, 271 U.S. 432 (1926). In light of the precedent of this Court, the State of New Mexico has no cause for complaint when Congress continues to exercise plenary authority over the Pueblo Indians through the enactment of the Pueblo Land Act Amendments of 2005.

The Pueblo Land Act Amendments of 2005 is a specific statute concerning criminal jurisdiction within Pueblo

lands, and it dominates the general provisions of 18 U.S.C. § 1151.[3] This Court has held that where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 550-551 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." (citations omitted)); *see also Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) (same); *Rodgers v. United States*, 185 U.S. 83, 86 (1902) ("The primary rule of statutory construction is, of course, to give effect to the intention of the legislature. Whenever that is apparent it dominates and interprets the language used.").

Congress' intent in passing the Pueblo Land Act Amendments of 2005 is apparent in the title of the legislation: "An

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[3] *United States v. Arrieta*, 436 F.3d 1246 (10th Cir. 2006), *cert. denied*, 126 S.Ct. 2368 (2006), decided after the enactment of the 2005 amendments, is instructive in two respects. The defendant in that case committed a crime against an enrolled member of the Pueblo of Pojoaque on a public road within the exterior boundaries of the Pueblo. The road, surrounded on both sides by non-Indian owned land, was maintained by the county. In upholding the exercise of criminal jurisdiction by the United States, the Tenth Circuit held that the public road is "Indian country" within the meaning of 18 U.S.C. §1151 because the Pueblo is a "dependent Indian community." In so holding, the Tenth Circuit reasoned that (a) the Pueblo land includes all land on which the Pueblo resides as "set aside for use by the Indians as Indian land," and (b) the Pueblo community is one "under federal superintendence."

The second compelling aspect of *Arrieta* is that the defendant and the United States agreed that the Pueblo Land Act Amendments of 2005 do not apply retroactively to confer Federal criminal jurisdiction over the defendant. The Tenth Circuit did find, however, that "because the [Pueblo Land Act Amendments of 2005 are] consistent with the result we reach under prior law, we need not further consider the amendment." *Id.* at 1251.

Act To amend the Act of June 7, 1924, to provide for the exercise of criminal jurisdiction." The explanatory statement to the legislation in the U.S. House of Representatives sheds further light on Congress' intent to clarify the allocation of criminal jurisdiction within the boundaries of Pueblo lands:

> Mr. RADANOVICH: . . . Mr. Speaker, S. 279, a bill sponsored by Senator Domenici, clarifies the uncertainty and potential law enforcement jurisdiction problems on all 19 Indian Pueblo reservations in the State of New Mexico.
>
> From 1913 to 2001, the United States Government prosecuted crimes committed by or against the New Mexico Pueblo Indians within the exterior boundaries of their reservation lands in the State of New Mexico. However, in 2001, a Federal judge, relying on a case about tribal jurisdiction in the State of Alaska, ruled that felonies committed by Indians on private lands within the boundaries of New Mexico Pueblos are not subject to Federal jurisdiction. The U.S. Attorney for New Mexico did not appeal the decision and, therefore, has failed to prosecute any felonies by or against Indians on these lands.
>
> At the same time that the Federal Government was declining to prosecute any felonies on Indian Pueblo lands, a New Mexico State court ruled that the State of New Mexico lacked jurisdiction to prosecute felonies committed by an Indian defendant against a non-Indian on private lands within the Pueblos. As a result, there is currently a large void in criminal jurisdiction at the Federal, State, and tribal levels.
>
> S. 279 corrects this void of jurisdiction by clarifying that, one, the United States will have jurisdiction over crimes defined under the Major

> Crimes Act committed by or against any Indian; two, the State of New Mexico will have jurisdiction clarified as to non-member Indians or non-Indians for all non-Major Crimes Act offenses; and, three, the New Mexico Pueblo governments will have jurisdiction over their individual members or other Indians for other offenses.
>
> S. 279 enjoys bipartisan support and has the support of the entire New Mexico delegation. I look forward to passing this necessary legislation and urge its timely enactment in this session.

151 Cong. Rec. H11,047 (daily ed. Dec. 6, 2005). As requested by the State of New Mexico, the congressional intent fulfills the State's expressed desire in its petition for certiorari that "jurisdictional tests should be clear, easy to apply and capable of producing predictable results."

Although this Court held in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), that "the term 'dependent Indian communities' is taken virtually verbatim from *Sandoval*," *id.* at 530, Congress clarified the unique status of the Pueblos by its subsequent amendment to the Pueblo Lands Act of 1924.

CONCLUSION

The Pueblo Land Act Amendments of 2005 constitutes a clear congressional directive regarding the allocation of criminal jurisdiction by Federal, State and Indian tribal governments within the exterior boundaries of the Pueblos of New Mexico. The Pueblo Land Act Amendments of 2005 clarified any remaining ambiguities with respect to criminal jurisdiction on Pueblo lands and ensures that the

jurisdictional issues giving rise to the case below are not capable of repetition. Respondent Matthew Gutierrez respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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